(8)

No. 03-9560 *** CAPITAL CASE ***

Title: Marlon Latodd Howell, aka Marlon Cox, Petitioner

v.

Mississippi

Docketed: March 26, 2004

Lower Ct: Supreme Court of Mississippi

Case Nos.: (2001-DP-01104-SCT)

Decision Date: October 23, 2003

Rehearing Denied: December 18, 2003

Questions Presented

| ~~Date~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~

03-9560

Supreme Court, U.S.
FILED
MAR 17 2004
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2003

MARLON HOWELL,

Petitioner,

vs.

STATE OF MISSISSIPPI,

Respondent.

MOTION FOR LEAVE TO PROCEED **IN FORMA PAUPERIS**

The petitioner, Marlon Howell, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed **in forma pauperis**. Petitioner has been granted leave to so proceed in the state courts. Petitioner's affidavit in support of this motion is attached hereto.

This the 17th day of March 2004.

André de Gruy*
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601-576-2316

Duncan Lott
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662-728-9733

Counsel for Petitioner

*Counsel of Record

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

MARLON HOWELL, PETITIONER

VERSUS

STATE OF MISSISSIPPI RESPONDENTS.

AFFIDAVIT OF MARLON HOWELL

STATE OF MISSISSIPPI

COUNTY OF SUNFLOWER

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the jurisdiction aforesaid, the within named MARLON HOWELL, who being by me first duly sworn, stated as follows:

My name is MARLON HOWELL. I am the petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefore; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? No

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer: _____

_____

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received: $11,000.00 Yearly $200 weekly

2. Have you received within the last twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

a. If the answer is yes, describe each source of income and state the amount received from each during the last twelve months: _____

3. Do you own any cash or checking or savings account? Yes

a. If the answer is yes, state the total value of the items owned: $ 200.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

a. If the answer is yes, describe the property and state its approximate value:

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons:

No one

_____

I understand that a false statement or answer to any questions on this affidavit will subject me to penalties for perjury.

This the 11th day of March.

Marlon Howell
MARLON HOWELL

SWORN TO AND SUBSCRIBED before me, this the 16th day of March, 2004.

_____
NOTARY PUBLIC

MY COMMISSION EXPIRES:
November 14, 2005

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2003

MARLON HOWELL,

Petitioner,

vs.

STATE OF MISSISSIPPI,

Respondent.

CERTIFICATE OF SERVICE OF
PETITION FOR WRIT OF CERTIORARI

I, André de Gruy, a member of the Bar of this Court, hereby certify that on this 17th day of March 2004, I deposited at the main post office on South West Street, Jackson, Mississippi, the Petition for Writ of Certiorari to the Hon. William K. Suter, Clerk of the Supreme Court of the United States, and to Marvin L. White, Jr., Esq., Assistant Attorney General, Post Office Box 220, Jackson, MS 39205, [telephone number (601) 359-3680], counsel for the respondent herein. I further certify that all parties required to be served have been served.

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Counsel for Petitioner

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IN THE
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October Term, 2003

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vs.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

THIS IS A DEATH PENALTY CASE

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QUESTION PRESENTED

1. Can a state court, consistent with the Eighth and Fourteenth Amendments to the Constitution of the United States, refuse to instruct a jury in a death penalty case on at least one lesser included offense that is recognized in state law and supported by the evidence?

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2003

MARLON HOWELL,

Petitioner,

vs.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

The petitioner, Marlon Howell, prays for a writ of certiorari to review the judgment of the Supreme Court of Mississippi affirming his conviction of capital murder and sentence of death.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported at Howell v. State, 860 So.2d 704 (Miss. 2003). The opinion is attached as Appendix "A" to this Petition.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on October 23, 2003, and rehearing denied on December 18, 2003. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257 on the ground that a right or privilege of the defendant which is claimed under the Constitution of the United States has been denied by the State of Mississippi.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provisions of the United States Constitution:

The Eighth Amendment to the Constitution of the United States, which provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States which provides, in pertinent part, that:

> No state shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Marlon Howell was indicted for capital murder, defined as killing during the commission of an attempted robbery, by a Union County, Mississippi, Grand Jury. Howell, 860 So.2d 704. He was tried and convicted of capital murder and sentenced to death by a jury in the Circuit Court of Union County, Mississippi. During the course of the trial Howell presented alternative defenses. He presented the absolute defense of alibi but also vigorously fought the alleged underlying felony of attempted robbery. If the jury concluded that the evidence of attempted robbery was not established beyond a reasonable doubt they could not find Howell guilty of capital murder. Id. at 742-43, ¶ 136.

The evidence of attempted robbery was weak. The only evidence supporting the theory was alleged accomplice testimony secured by plea bargain. And two of the state's witness undermined the state's own case. First, a co-defendant-turned-state's-witness testified that the shooting was

done by Howell but it resulted from Mr. Pernell spraying Howell in the face with mace. Id. at 714, ¶ 11. Further, the shooting was observed by a disinterested witness, Charles Rice. Mr. Rice testified that he observed a conversation and that there were no indications of a robbery taking place. Id. at 713, 743, ¶¶ 3, 136.

Howell sought a jury instruction on "simple" murder and manslaughter. The trial court denied these instructions. Howell raised this issue on appeal to the state supreme court but was denied relief. Id. at 741-44. In affirming, the state court relied exclusively on two state court decisions from the 1970s. Id. at 744, ¶ 139. Neither case involved the death penalty, nor did either case address the federal constitution. Such a cursory rejection of a fundamental principle of constitutional law mandates careful review by this Court.

REASONS FOR GRANTING THE WRIT

IN AFFIRMING THE TRIAL COURT'S DENIAL OF A REQUESTED LESSER INCLUDED OFFENSE INSTRUCTION THE MISSISSIPPI SUPREME COURT IGNORED TWENTY-FIVE YEARS OF CASELAW FROM THIS COURT, THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND ITS OWN DECISIONS, RESULTING IN A VIOLATION OF MARLON HOWELL'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Marlon Howell requested his jury be instructed on the lesser included offenses of murder and manslaughter. Howell v. State, 860 So.2d at 741-44, ¶ 131-40. The trial court refused those instructions and his case was submitted to the jury with two options – guilty of capital murder or not guilty of any offense. Id. Howell argued in the trial court and on appeal to the state supreme court that he was vigorously fighting the evidence of robbery – the underlying felony elevating the case from murder to capital murder thus subjecting him to the possibility of a death sentence. Id. at ¶ 136.

The state supreme court recognized that Howell's argument, based on the facts of this case, was that:

> The jury could have found and returned the lesser-included offense of simple murder or manslaughter. The fact remains that if this jury had believed Howell approached Pernell's vehicle to sell him drugs and was sprayed in the face with mace by Pernell in reaction, then they could have returned a conviction on manslaughter.[1] The [c]ourt's failure to instruct the jury on the lesser included offense of simple murder and manslaughter was error. The jury as instructed had no choice but either to turn Howell loose or convict him of [c]apital murder ...

Nonetheless, the court held Howell was not entitled to a lesser included offense based on 1975 and 1979 state court decisions. Howell at ¶ 139 (citing Presley v. State, 321 So.2d 309 (Miss. 1975)

[1] More appropriately a reasonable juror could have returned a verdict of guilty of murder pursuant to Miss. Code § 97-3-19 (1)(c). Under this fact scenario Howell would have been guilty of killing during the commission of a felony, i.e., attempt to sell drugs.

and Grace v. State, 375 So.2d 419, 420 (1979)). Neither case involved the death penalty. Clearly the state court failed to consider this Court's substantial jurisprudence on this issue since 1980. In holding that Howell was not entitled to a lesser-included offense instruction of murder, the state court ignored its precedent and the mandates of this Court. See Beck v. Alabama, 447 U.S. 625 (1980).

Where as here the evidence in a capital murder trial could support a verdict of guilt of a non-capital offense, the defendant is entitled under the Eighth and Fourteenth Amendments to the Constitution of the United States to submit to the jury an instruction on the non-capital offense. Beck v. Alabama, 447 U.S. 625, 638 (1980). The resulting capital murder conviction upon which the death sentence rests is unreliable and the decision of guilt beyond a reasonable doubt uncertain. Beck at 642-43.

This Court's "fundamental concern in Beck was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all." Schad v. Arizona, 501 U.S. 624, 646 (1991). The Court previously acknowledged that "[t]he absence of a lesser included offense instruction increases the risk that the jury will convict . . . simply to avoid setting the defendant free." Spaziano v. Florida, 468 U.S. 447, 455 (1984). As the Beck Court noted, such a risk of unwarranted conviction cannot be tolerated in a case in which the defendant's life is at stake. Beck, 447 U.S. at 637.

The goal of Beck was to "eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." Schad, 501 U.S. at 646-47. The Beck Court recognized that the issue of lesser included offenses directly impacted the reliability of the guilt determination in capital cases. Schad, 501 U.S. at 646.

The Fifth Circuit has held that Beck is violated where the trial judge erroneously fails to give a lesser offense instruction. Cordova v. Lynaugh, 838 F.2d 764, 767 (5th Cir. 1988), cert.

denied, 108 S.Ct. 2832 (1988). Under the Eighth Amendment to the Constitution of the United States, "a lesser included offense instruction should be given if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser included offense and acquit him of the greater." Id. at 767. The denial of such an instruction in violation of this standard in a capital murder case can never be harmless error. Cordova, 838 F.2d at 770, n. 8. "Beck stands for the proposition that 'the jury [in a capital case] must be permitted to consider a verdict of guilt of a non-capital offense 'in every case' in which 'the evidence would have supported such a verdict.'" Cordova, 838 F.2d at 767.

The question then becomes, as a matter of state law is "murder" a lesser-included offense of "capital murder?" The Mississippi Supreme Court definitively answered that question in Watts v. State, 717 So.2d 314 (Miss. 1998). In Watts the State of Mississippi argued and the trial court held that "simple murder is a lesser included offense of capital murder." Watts at ¶ 11 In evaluating this claim the state supreme court held:

¶12. In support of his argument, Watts cites to two Fifth Circuit Court of Appeals' cases, Jones v. Thigpen, 741 F.2d 805 (5th Cir. 1984) 475 U.S. 1003, 106 S.Ct. 1172, 89 L.Ed.2d 292 and Bell v. Watkins, 692 F.2d 999 (5th Cir. 1982), for the theory that "'[i]n Mississippi, no murder committed during the course of a robbery can be a simple murder.'" Jones v. Thigpen, 741 F.2d 805, 816 (5th Cir. 1984) (quoting Bell v. Watkins, 692 F.2d 999, 1004-05 (5th Cir. 1982)), *vacated on other grounds* , 475 U.S. 1003 (1986). Both Jones and Bell involved situations in which the trial court refused to give a lesser offense instruction where the defendant was charged with capital murder while engaged in the commission of robbery. Jones, 741 F.2d at 815-16; Bell, 692 F.2d at 1004-05. In Jones, the Fifth Circuit held that the trial court did not commit error by refusing to give a lesser included offense instruction of simple murder where no lesser included offense was provided by state law for murder committed during the commission of a robbery. Jones, 741 F.2d at 816. In Bell, the Fifth Circuit, stating that under Mississippi law "no murder committed during the course of a robbery can be simple murder," similarly held that the trial court's refusal to give a lesser included offense instruction was

proper where there was no evidence to support the lesser charge. Bell, 692 F.2d at 1005.

¶13. This Court, however, in Fairchild v. State, 459 So. 2d 793 (Miss. 1984), held that this theory was flawed because it presupposed that the defendant was guilty of robbery. Fairchild v. State, 459 So. 2d 793, 800 (Miss. 1984). The Fairchild Court stated:

> The theory is flawed. It determines what instruction will be granted at the request of the capital murder defendant on the basis of a presumption that he has already been found guilty of the underlying felony. The theory forgets that there is no such thing as a directed verdict of guilty in a criminal case, either on the principal charge in general or on any of its components. Its logic requires the determination that the proof offered by the State where not substantially contradicted must perforce be believed by the jury and so acted upon in their verdict. True, the evidence that Fairchild participated in a robbery in this case is substantial. What the trial judge has done, however--following the theory advanced by the Fifth Circuit--has been to find as a matter of law that Fairchild is guilty of robbery *before the case is ever submitted to the jury*. This constitutionally he has no authority to do.

Fairchild, 459 So.2d at 800. Based on this logic, this Court held that it was error, although not reversible error because Fairchild received the same sentence that he would have received for a conviction of simple murder, for the trial court to refuse to grant a lesser included offense instruction on simple murder. Id. at 801. Thus, Watts' reliance on Jones and Bell is unfounded where this Court has held that a simple murder instruction may be given on a charge of capital murder. In addition, this Court has stated that "[b]y its form, [Miss. Code Ann. §97-3-19] implicitly recognizes the established doctrine that simple murder is a lesser included offense of capital murder." Wheeler v. State, 536 So.2d 1341, 1344 (Miss. 1988).

Watts at 319.

Without question, as a matter of state law, murder is a lesser included offense of capital murder.[2] Accordingly, the denial of the requested a lesser-included offense instruction for which Mr. Howell could have been found guilty as a matter of state law violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, this Court should grant the writ of certiorari, vacate the judgment of the Mississippi Supreme Court, and either set this case for review or summarily reverse the opinion of the state court.

Respectfully submitted,

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[2] See also Miss. Code § 99-17-20 providing in death eligible cases for instruction on any non-death eligible offense.

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860 So.2d 704
(Cite as: 860 So.2d 704)

Supreme Court of Mississippi.

Marlon Latodd HOWELL a/k/a Marlon Cox
v.
STATE of Mississippi.

No. 2001-DP-01104-SCT.

Oct. 23, 2003.
Rehearing Denied Dec. 18, 2003.

Defendant was convicted following jury trial in the Circuit Court, Union County, R. Kenneth Coleman, J., of capital murder and was sentenced to death. Defendant appealed. The Supreme Court, Easley, J., held that: (1) denial of motion for change of venue was not abuse of discretion; (2) state provided race-neutral reasons for peremptory strikes of two African-American prospective jurors; (3) identification testimony by eyewitness was sufficiently reliable; (4) testimony about defendant's statements that he needed money to pay his probation officer was admissible to establish defendant's motive and intent; (5) evidence supported finding that defendant intended to rob victim; (6) defense's cross-examination of police officer concerning defendant's prior guilty plea to possession of a controlled substance "opened the door," at sentencing phase during which defense attempted to establish lack of significant criminal history, to state's introduction of indictment for sale of marijuana; and (7) death sentence was not imposed under influence of passion, prejudice, or any other arbitrary factor, was supported by statutory aggravating circumstances that capital offense was committed in course of a robbery for pecuniary gain and by a person under a sentence of imprisonment, probation, or parole, and was not excessive or disproportionate.

Conviction and sentence affirmed.

Cobb, J., concurred in part and in result.

Waller, J., concurred with separate written opinion joined by Pittman, C.J., Cobb and Carlson, JJ., and joined in part by Graves, J.

Graves, J., dissented with separate written opinion joined by McRae, P.J.

West Headnotes

[1] Criminal Law ⇦121
110k121 Most Cited Cases

Decision to grant a venue change rests in the sound discretion of the trial judge. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[2] Criminal Law ⇐1150
110k1150 Most Cited Cases

State Supreme Court will not disturb the ruling of the trial court where the sound discretion of the trial judge in denying a change of venue was not abused. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[3] Criminal Law ⇐126(1)
110k126(1) Most Cited Cases

The accused has a right to a change of venue when it is doubtful that an impartial jury can be obtained. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[4] Criminal Law ⇐134(1)
110k134(1) Most Cited Cases

Upon proper application for change of venue, there arises a presumption that impartial jury cannot be obtained in present venue, and the state then bears the burden of rebutting that presumption. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[5] Criminal Law ⇐134(1)
110k134(1) Most Cited Cases

Certain elements, when present, serve as an indicator to trial court that presumption of prejudicial pretrial publicity for purposes of motion to change venue is irrefutable, including: (1) capital cases based on considerations of a heightened standard of review; (2) crowds threatening violence towards the accused; (3) an inordinate amount of media coverage, particularly in cases of (a) serious crimes against influential families; (b) serious crimes against public officials; (c) serial crimes; (d) crimes committed by a black defendant upon a white victim; (e) where there is an inexperienced trial counsel. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[6] Criminal Law ⇐134(4)
110k134(4) Most Cited Cases

Denial of motion for change of venue in capital murder case was not abuse of discretion; there was no evidence offered of any threatened violence towards defendant nor an inordinate amount of media coverage, testimony of state's witnesses demonstrated that defendant could receive a fair trial and defendant offered no additional evidence to rebut state's witnesses and support his motion, and defendant did not present any evidence that he could not or did not receive a fair trial from 12 jurors who heard his case. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[7] Criminal Law ⇐126(1)
110k126(1) Most Cited Cases

Linchpin for reviewing the denial of change of venue motion is whether the venire members stated that they could be fair and impartial jurors if chosen. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[8] Costs ⇐302.3
102k302.3 Most Cited Cases

Denial of motion for funds for an investigator to look into possible mitigating issues was not error in capital murder case. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[9] Costs ⇐302.2(2)
102k302.2(2) Most Cited Cases

Denial of defendant's request in capital murder case for funds to hire a jury consultant was not error, where defendant did not proceed as an indigent or have trial court declare him to be an indigent. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[10] Costs ⇐302.2(2)
102k302.2(2) Most Cited Cases

Alleged lack of familiarity on part of defendant's father with venire panel drawn in capital murder case did not require grant of defendant's request for a jury consultant. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[11] Costs ⇐302.1(5)
102k302.1(5) Most Cited Cases

Denial of defendant's request in capital murder case for daily transcripts of testimony of co-defendants and of secondary witnesses was not abuse of discretion. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[12] Criminal Law ⇐641.5(1)
110k641.5(1) Most Cited Cases

Refusal to furnish defendant in capital murder case a court-appointed attorney to assist his retained counsel was not error. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[13] Criminal Law ⇐641.5(1)
110k641.5(1) Most Cited Cases

Constitution does not require the appointment of two attorneys in a case where the death penalty is involved. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[14] Costs ⇐302.4
102k302.4 Most Cited Cases
Denial in capital murder case of defendant's request for funding for additional psychiatric examination, after defendant had received a psychiatric examination from a particular doctor by agreement of the parties, was not abuse of discretion, where defendant did not proceed as an indigent or raise insanity as a defense. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[15] Criminal Law ⇐1158(3)
110k1158(3) Most Cited Cases

A reversal of a determination as to whether exercise of peremptory challenges was result of purposeful discrimination will only occur if the factual findings of the trial judge appear to be clearly erroneous or against the overwhelming weight of the evidence. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[16] Criminal Law ⇐1158(3)
110k1158(3) Most Cited Cases

On appellate review, the trial court's determinations under *Batson v. Kentucky* with respect to whether exercise of peremptory challenges was result of purposeful discrimination are accorded great deference because those determinations are based, in a large part, on credibility. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[17] Constitutional Law ⇐221(4)
92k221(4) Most Cited Cases

A peremptory challenge based on race constitutes a violation of equal protection. (Per Easley, J., with two justices concurring and three justices concurring in result.) U.S.C.A. Const.Amend. 14 .

[18] Jury ⇐33(5.15)
230k33(5.15) Most Cited Cases

To establish a prima facie case that race was the criterion for exercise of a peremptory challenge, the objecting party must show (1) that he/she is a member of a cognizable racial group, (2) the prosecutor has exercised peremptory challenges toward the elimination of prospective jurors of his race, and (3) the facts and circumstances raised an inference that the prosecutor used his peremptory challenges for the purpose of striking minorities. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[19] Jury ⇐33(5.15)
230k33(5.15) Most Cited Cases

African-American prospective juror's prior arrests and reluctance of that prospective juror's brother to tell officers that he had seen automobile accident in which another motorist ran into prosecutor's vehicle were race- neutral reasons for state's peremptory strike of prospective juror in capital murder case. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[20] Jury ⇐33(5.15)
230k33(5.15) Most Cited Cases

African-American prospective juror's claim on jury questionnaire that he had never been arrested for a crime, when he had in fact been arrested for receiving stolen property, provided race-neutral reason for state's exercise of peremptory strike against that prospective juror in capital murder case. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[21] Jury ⇐131(1)
230k131(1) Most Cited Cases

A jury selection procedure which gives the defendant a fair opportunity to ask questions of individual jurors which may enable the defendant to determine his right to challenge that juror is proper. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[22] Jury ⇐131(2)
230k131(2) Most Cited Cases

[22] Jury ⇐131(4)
230k131(4) Most Cited Cases

Trial court has broad discretion in passing upon the extent and propriety of questions addressed to prospective jurors. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[23] Jury ⇐131(13)
230k131(13) Most Cited Cases
Denial in capital murder case of defendant's request to conduct individual sequestered voir dire of prospective jury members who had read articles or seen information about case on television was not error; each of those prospective jurors had been individually questioned, by way of juror questionnaires, about what they knew about defendant, his co-defendants, or their families, and more importantly, none of those prospective jurors ended up serving on jury. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[24] Jury ⇐131(15.1)
230k131(15.1) Most Cited Cases

Sustaining of state's objection during voir dire in capital murder case to a question as to whether prospective juror had ever seen or heard of police officers "puffing up" or giving untrue testimony about facts of a case was not abuse of discretion. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[25] Jury ⇐131(8)
230k131(8) Most Cited Cases
Sustaining of state's objection during voir dire in capital murder case to a question about the type of cases in which prospective juror might vote for death penalty was not abuse of discretion. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[26] Jury ⇐131(8)
230k131(8) Most Cited Cases

Sustaining of state's objection during voir dire in capital murder case to a question as to whether prospective jurors believed mercy should be a factor in considering a death penalty sentence was not abuse of discretion. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[27] Jury ⇐131(2)
230k131(2) Most Cited Cases

Voir dire is conducted under the supervision of the court, and a great deal must be left to its sound discretion. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[28] Criminal Law ⇐1152(2)
110k1152(2) Most Cited Cases

Standard of review in examining the conduct of voir dire is abuse of discretion. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[29] Criminal Law ⇐1152(2)
110k1152(2) Most Cited Cases

Abuse of discretion in the conduct of voir dire will only be found where a defendant shows clear prejudice resulting from undue lack of constraint on the prosecution or undue constraint of the defense. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[30] Criminal Law ⇐339.8(4)
110k339.8(4) Most Cited Cases

As admitted in capital murder prosecution, testimony of eyewitness identifying defendant as shooter was sufficiently reliable and identification did not need to be suppressed as suggestive, though eyewitness' view of shooter was brief, where eyewitness paid close attention once he realized a shooting had taken place, accurately described defendant as a young, clean cut, black male, was absolutely certain of defendant's identity when he saw him in lineup, and made that identification from the lineup a little over 24 hours after the shooting. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[31] Criminal Law ⇐747
110k747 Most Cited Cases

Jury alone determines the weight and worth of any conflicting testimony. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[32] Criminal Law ⇐339.10(5)
110k339.10(5) Most Cited Cases

Probation and parole officer had legal authority to issue arrest warrant that another probation and parole officer had entered into computer but had not signed, and thus witness's identification of defendant was not the result of an illegal arrest. (Per Easley, J., with two justices concurring and three justices concurring in result.) West's A.M.C. § 47-7-37 .

[33] Criminal Law ⇐371(12)
110k371(12) Most Cited Cases

Testimony about defendant's statements that he needed money to pay his probation officer was admissible in capital murder case to establish defendant's motive and intent, despite defendant's claim that the probative value of admitting the statement, which revealed defendant's prior convictions, did not outweigh the prejudicial effect. (Per Easley, J., with two justices concurring and three justices concurring in result.) Rules of Evid., Rule 404(b) .

[34] Criminal Law ⇐407(1)
110k407(1) Most Cited Cases

Testimony that declarant told witness that defendant had shot somebody did not constitute hearsay and was admissible in capital murder prosecution as an "adoptive admission," where defendant was present when statement was made and did not dispute statement, requested that witness drive him home "right now," and told witness that "y'all don't need to tell nobody." (Per Easley, J., with two justices concurring and three justices concurring in result.) Rules of Evid., Rule 801(d)(2)(B) .

[35] Witnesses ⇐291
410k291 Most Cited Cases

Refusal in capital murder case to allow re-cross examination of prosecution witness concerning criminal charges that were pending against him when he gave statement to district attorney's office was not error, where witness testified on re-direct examination that he had charges pending when he talked to district attorney's office and that those charges were not discussed and he received no promises or leniency in exchange for his testimony. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[36] Criminal Law ⇐1159.2(2)
110k1159.2(2) Most Cited Cases

[36] Criminal Law ⇐1159.2(3)
110k1159.2(3) Most Cited Cases
A jury's finding of fact is not to be overturned when there is credible evidence in the record for which the jury could have reasonably inferred the offense or unless the verdict was clearly against the overwhelming weight of the evidence. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[37] Homicide ⇐1165
203k1165 Most Cited Cases

Finding that defendant intended to rob victim was supported in capital murder prosecution by evidence that defendant told companions on night of murder that he needed some money to pay his probation officer, that defendant reached into victim's car and there was some "scuffling or fighting" prior to fatal shooting, and that police found large amount of change on floorboard of driver's side of victim's car. (Per Easley, J., with two justices concurring and three justices concurring in result.) West's A.M.C. §§ 97-3-19(2)(e) , 97-3-73 .

[38] Homicide ⇐1456
203k1456 Most Cited Cases
[38] Homicide ⇐1457
203k1457 Most Cited Cases

Instructions on simple murder and manslaughter were not warranted based on the evidence in capital murder prosecution arising from fatal shooting that allegedly occurred during commission of a robbery. (Per Easley, J., with two justices concurring and three justices concurring in result.) West's A.M.C. §§ 97-3-19(2)(e) , 97-3-73 .

[39] Criminal Law ⇦763(1)
110k763(1) Most Cited Cases

Instructions that comment on the weight of the evidence are not proper. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[40] Criminal Law ⇦829(1)
110k829(1) Most Cited Cases

A trial judge is under no obligation to grant redundant instructions. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[41] Criminal Law ⇦1173.1
110k1173.1 Most Cited Cases

Refusal to grant an instruction which is similar to one already given does not constitute reversible error. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[42] Criminal Law ⇦829(12)
110k829(12) Most Cited Cases

Proposed jury instruction on weight of evidence was properly denied in capital murder prosecution in view of instructions that were given concerning how to view evidence as a whole, accomplice testimony, and inconsistent statements or testimony. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[43] Criminal Law ⇦829(16)
110k829(16) Most Cited Cases
Refusal in capital murder case of proposed instruction that jury should not give greater or lesser credence to testimony of any witness merely because he or she was a law enforcement officer was not abuse of discretion in view of instructions that were given on how to weigh credibility of each and every witness. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[44] Criminal Law ⇦829(16)
110k829(16) Most Cited Cases

Denial of proposed jury instruction relating to cross-racial eyewitness identification was not error in capital murder case in which white eyewitness identified defendant, who was black, as shooter; other evidence corroborated that identification, and jury was properly instructed on how to weigh credibility of each witness who testified. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[45] Criminal Law ⇦867
110k867 Most Cited Cases

Whether to grant a motion for mistrial is within the sound discretion of the trial court. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[46] Criminal Law ⇦1155
110k1155 Most Cited Cases

Standard of review for denial of a motion for mistrial is abuse of discretion. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[47] Criminal Law ⇦855(1)
110k855(1) Most Cited Cases

[47] Criminal Law ⇦857(1)
110k857(1) Most Cited Cases

Denial of motion for mistrial was not abuse of discretion in capital murder prosecution, where defendant did not submit any proof to support allegation that a juror's father had been sitting on front row with victim's family and did not present any evidence that jury did not follow trial court's instructions in rendering its verdict or that defendant was prejudiced in any way. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[48] Criminal Law ⇦721(3)
110k721(3) Most Cited Cases

Closing argument comments by prosecutor, "if you had an alibi and were accused of capital murder, don't you think you would tell somebody about it? Don't you think you would have given some details? Done something?," were not an improper comment on defendant's failure to testify, but concerned the lack of a successful alibi defense. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[49] Criminal Law ⇦708.1
110k708.1 Most Cited Cases

Attorneys are allowed wide latitude in closing arguments. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[50] Criminal Law ⇦730(1)
110k730(1) Most Cited Cases

Trial judge is in the best a position to determine if an alleged objectionable remark has a prejudicial effect. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[51] Criminal Law ⇦867
110k867 Most Cited Cases

Trial judge is provided considerable discretion to determine whether a remark is so prejudicial that a mistrial should be declared. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[52] Criminal Law ⇦709
110k709 Most Cited Cases

An alleged improper prosecutorial comment during closing argument must be considered by the appellate court in context in which the statement was made. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[53] Criminal Law ⇦1134(3)
110k1134(3) Most Cited Cases

Appellate court reviews each alleged comment on a defendant's failure to testify on a case by case a basis. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[54] Criminal Law ⇦633(1)
110k633(1) Most Cited Cases

Trial judges normally have broad discretion in their decision on the time to begin a trial and the length of the proceedings each day. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[55] Sentencing and Punishment ⇦1774
350Hk1774 Most Cited Cases

Denial in capital murder case of motion for 24-hour "cooling off period" between guilt and sentencing phase was not abuse of discretion. (Per Easley, J., with two justices concurring and three justices concurring in result.) West's A.M.C. § 99-19-101(1) .

[56] Sentencing and Punishment ⇦1680
350Hk1680 Most Cited Cases

Aggravating factor in capital murder case that capital offense was committed by a person "under sentence of imprisonment" can include probated, paroled, and suspended sentences. (Per Easley, J., with two justices concurring and three justices concurring in result.) West's A.M.C. § 99-19-101(5)(a) .

[57] Criminal Law ⇦1042
110k1042 Most Cited Cases

Defendant in capital murder case was procedurally barred from raising on appeal the argument that prosecution improperly used pecuniary gain both at trial and during sentencing phase to provide an aggravating factor, where defendant failed to raise that objection at sentencing hearing. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[58] Criminal Law ⇦1030(1)
110k1030(1) Most Cited Cases

If no contemporaneous objection is made, the error, if any, is waived. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[59] Sentencing and Punishment ⇦1660
350Hk1660 Most Cited Cases

That capital offense was committed for pecuniary gain during course of robbery was proper

aggravating factor in prosecution in which robbery was also alleged as underlying felony for felony murder charge. (Per Easley, J., with two justices concurring and three justices concurring in result.) West's A.M.C. §§ 97-3-19(2)(e) , 97-3-73 .

[60] Criminal Law ⇦1130(5)
110k1130(5) Most Cited Cases

Argument raised on appeal in capital murder prosecution, that a prior indictment for sale of a controlled substance was not relevant and was highly prejudicial, was waived by defendant's failure to cite relevant authority. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[61] Sentencing and Punishment ⇦1762
350Hk1762 Most Cited Cases

Defense's cross-examination of police officer concerning defendant's prior guilty plea to possession of a controlled substance "opened the door," at sentencing phase of capital murder prosecution at which defense was attempting to establish mitigating factor of no significant criminal history, to state's introduction of indictment for sale of a controlled substance, namely, marijuana, with respect to which defendant had entered guilty plea to lesser offense of possession. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[62] Criminal Law ⇦769
110k769 Most Cited Cases

Jury instructions are within the sound discretion of the trial court. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[63] Sentencing and Punishment ⇦1780(3)
350Hk1780(3) Most Cited Cases

Instruction at sentencing phase of capital murder prosecution, cautioning jurors not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling, was not improper. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[64] Sentencing and Punishment ⇦1789(3)
350Hk1789(3) Most Cited Cases

Argument raised on appeal in capital murder case, that trial court erred by denying proposed sentencing instruction and by not providing adequate sentencing instruction definitions, was procedurally barred based on defendant's to provide any authority other than a reference to a publication containing model jury instructions. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[65] Sentencing and Punishment ⇦1780(3)
350Hk1780(3) Most Cited Cases

Instructions at sentencing phase of capital case that defined mitigating circumstances as those which tended to warrant the less severe penalty of life imprisonment, defined aggravating circumstances as those which tended to warrant the death penalty, and set forth the exact elements of alleged

aggravating and mitigating circumstances, adequately informed jury of definitions of those terms. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[66] Criminal Law ⇦1171.1(1)
110k1171.1(1) Most Cited Cases

Where a prosecutor has made an improper argument, the question on appeal is whether the natural and probable effect of the improper argument of the prosecuting attorney is to create an unjust prejudice against the accused as to result in a decision influenced by the prejudice so created. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[67] Sentencing and Punishment ⇦1780(2)
350Hk1780(2) Most Cited Cases

Prosecutor's comments during closing argument at sentencing phase of capital murder case, that jury should not be swayed by a "guilt trip," that victim had worked to earn money whereas defendant had murdered victim for money, and that defendant had ruined not only the lives of victim's family but also the lives of his own family, did not create an unjust prejudice against defendant. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[68] Criminal Law ⇦935(1)
110k935(1) Most Cited Cases

A motion for new trial challenges the weight of the evidence. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[69] Criminal Law ⇦1156(1)
110k1156(1) Most Cited Cases

A reversal of order denying a motion for new trial is warranted only if the lower court abused its discretion. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[70] Criminal Law ⇦1144.18
110k1144.18 Most Cited Cases

In reviewing an order denying motion for new trial, appellate court accepts as true the evidence which supports the verdict and gives to the prosecution the benefit of all favorable inferences that may be drawn from the evidence. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[71] Criminal Law ⇦935(1)
110k935(1) Most Cited Cases

Appellate court will not order a new trial unless the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction unconscionable injustice. (Per Easley, J., with two justices concurring and three justices concurring in result.)

[72] Sentencing and Punishment ⇦1788(4)
350Hk1788(4) Most Cited Cases

[72] Sentencing and Punishment ⇦1788(6)
350Hk1788(6) Most Cited Cases
Death sentence was not imposed under influence of passion, prejudice, or any other arbitrary factor, was supported by statutory aggravating circumstances that capital offense was committed in course of a robbery for pecuniary gain and by a person under a sentence of imprisonment, probation, or parole, and was not excessive or disproportionate when compared to other factually similar cases where death sentence was imposed. (Per Easley, J., with two justices concurring and three justices concurring in result.) West's A.M.C. § 99-19- 105(3) .
***712** Duncan L. Lott, Booneville, attorneys for appellant.

Office of the Attorney General by Judy T. Martin, Marvin L. White, Jr., Joanne M. Mcleod , Jerrolyn M. Owens , attorneys for Appellee.

En Banc.

EASLEY , Justice, for the Court.

PROCEDURAL HISTORY

¶ 1. Marlon Latodd Howell (Howell) was indicted along with Curtis W. Lipsey (Lipsey) and Adam Ray (Ray) for capital murder arising from the slaying and attempted robbery of Hugh David Pernell (Pernell) in New Albany, Mississippi. Howell was tried and convicted of capital murder in the Union County Circuit Court. The jury determined that Howell should suffer the penalty of death by lethal injection. Howell's subsequent motion for a new trial was denied. Howell perfected his appeal to this Court after being allowed to proceed in forma pauperis.

FACTS

¶ 2. Pernell, a retired postal worker, worked as a newspaper carrier for the *Tupelo Daily Journal*. On May 15, 2000, Pernell was delivering newspapers when he was flagged down by another vehicle sometime after 5:00 a.m. Howell, Ray and Lipsey were in the other vehicle. Howell approached Pernell's driver's side window and shot Pernell. Pernell's vehicle hit a parked vehicle in a nearby driveway. Howell, Ray and Lipsey fled the scene.

¶ 3. The murder occurred in front of the home of Charles Rice (Rice). At the time, Rice was up watching television and getting ready for work. David Grisham (Chief Grisham), New Albany Police Chief, investigated Pernell's murder and spoke with Rice. Rice had observed the exchange. Rice testified that he looked out his window when he heard a horn blowing. ***713** He observed the two vehicles stop in front of his house. Rice testified that a man got out of the passenger's side of the rear vehicle and walked between the two vehicles up to the driver's side of the front vehicle. A conversation ensued, and then the man pulled out a pistol and shot the driver. The shooter then jumped back and got into the rear vehicle which had pulled up to pickup the shooter. Rice testified that he called 911. Rice described the shooter as a young black male, early twenties, clean cut, short hair, approximately six feet tall, light complexion. Rice described the rear vehicle as a dark-colored, late model Oldsmobile based upon the insignia in the middle of the tail lights. Later on May 15, 2000, Chief Grisham received an anonymous telephone call suggesting that he question Lipsey. Chief Grisham left a message for Lipsey to contact the police. Lipsey and Ray voluntarily went to the police

station where they were interviewed by Officers Tim Kent (Officer Kent) and Chief Grisham. Based on the statements made by Lipsey and Ray, Chief Grisham began looking for Howell.

¶ 4. Howell was arrested at approximately 7:30 p.m. on May 15, 2000, and questioned by Officer Kent and Chief Grisham. Howell stated that he did not know anything about the shooting. Howell claimed that he was in Corinth with a woman at the time of the murder.

¶ 5. Brandon Shaw (Shaw) testified that on May 14, 2000, he rode around with Lipsey and Ray. They picked up Howell. When Howell got into the vehicle, he stated that he needed money to pay his probation officer. [FN1] The four then drove to Tupelo. While stopped at a gas station, Howell observed a man in the parking lot and stated "there goes an easy lick." After returning to New Albany, Howell, Lipsey, Ray and Shaw sat around at Shaw's house for a few hours talking. Shaw's brother, Quinton Shaw (Quinton), and his girlfriend, Andrea, were also at the house but in a bedroom. Howell, Lipsey and Ray left together around 4:00 a.m. in Ray's grandmother's car. They all returned together around 5:30 a.m.

FN1. At the sentencing phase of trial, Officer Nance testified that a probationer had to pay a $25 monthly supervision fee and an extra $10 if a probationer fails a drug test.

¶ 6. Marcus Powell (Powell), who lived in Blue Mountain, had arrived at Shaw's home around 5:10 a.m. and had gone to sleep on the couch. Earlier that evening, Powell had used Quinton's Chevy Lumina. On cross-examination, Powell testified that he was awakened by Howell, Lipsey and Ray returning to Shaw's house. Powell saw them go back to Shaw's bedroom. Howell was wearing a green shirt that evening, and he had a green shirt wrapped around his hand when he returned to the house. Ray came back to the living room and sat down. Powell never saw a gun.

¶ 7. Shaw testified that his cousin, Ray, came back to his bedroom, knocked on the door and stated that "Howell had shot somebody." Shaw came out of his bedroom and saw Howell in the living room with a green shirt wrapped around his hand. Howell asked Shaw to drive him home. Shaw asked his brother to borrow his Chevy Lumina to carry Howell home to Blue Mountain. Powell also wanted a ride home to Blue Mountain.

¶ 8. While Shaw went to borrow Quinton's car keys, Howell, Ray and Lipsey had already gone outside. Howell still had the green shirt around his hand. Shaw testified that he carried Powell home first and then dropped Howell off at his house.

¶ 9. Shaw then dropped off Lipsey and ***714** Ray. [FN2] When Shaw returned home, he discovered a gun in his backyard. Shaw convinced Lipsey and Ray to go with him to the police later that day to report what had happened. Officer Kent went behind Shaw's house and discovered a gun in the weeds in the backyard. Shaw testified that the gun was lying on top of a bag in the bushes when Officer Kent came to retrieve it.

FN2. Ray had returned his grandmother's car before they left for Blue Mountain.

¶ 10. Lipsey testified that he was with Howell when he shot Pernell. On the evening of May 14, 2000, Lipsey was with Shaw and Ray when they picked up Howell to go to Tupelo. According to Lipsey, Howell indicated that he needed money to pay his probation officer. While in Tupelo, Howell spotted a man outside at a payphone at a convenience store. Howell stated that the man would be "a good lick."

¶ 11. Lipsey further testified that after leaving Shaw's house, he was in the car with Ray and Howell when Howell reached over and blinked the vehicle's lights at another vehicle trying to make it stop. Howell got out of the vehicle trying to make the other vehicle stop. Howell then went over to the other vehicle and began fighting with the man for about half a minute. Howell pulled a gun and shot the man. Howell then jumped back into the vehicle and went back to Shaw's house with Lipsey and Ray. Lipsey testified that Howell told them that the man sprayed him in the face with mace, so he shot him.

¶ 12. According to Lipsey, Howell woke Shaw when they got to Shaw's house. Lipsey testified that he and Ray remained in the living room while Howell went to get Shaw. Shaw carried Powell home first and then dropped off Howell. Lipsey saw Howell take a Wal-Mart sack out of the vehicle and put the gun in the sack. Lipsey did not know what Howell did with the gun.

¶ 13. Lipsey testified that he went with Shaw and Ray to the police station later that day. He made two statements to the police. For his participation in Pernell's murder, Lipsey pled guilty to manslaughter and armed robbery, receiving a sentence of twenty years and ten years, respectively, to run consecutively.

¶ 14. Powell testified that on May 14, 2000, he initially arrived at Shaw's house around 8:00 p.m. Ray was already at Shaw's house when he arrived. Ray and Shaw left together to pick up Howell and Lipsey. All four returned to Shaw's house. Powell testified that Howell stated that he needed to pay his probation officer or he was going to be locked up. Shaw, Howell, Ray and Lipsey all left Shaw's home around 11:00 p.m. Powell borrowed Quinton's vehicle to go to Pontotoc.

¶ 15. Powell returned to Shaw's house in New Albany around 5:10 a.m. Powell was asleep on the couch when Howell, Lipsey and Ray came back to Shaw's house. Ray sat on the couch beside him. Howell went back to Shaw's bedroom. Powell testified that Shaw used Quinton's vehicle to carry Howell and him home to Blue Mountain. Powell never saw Howell with a gun, but Howell had a green shirt wrapped around his hand. Powell testified that it was the same green shirt Howell had been wearing earlier. Powell was dropped off at his home first.

¶ 16. Dr. Steven Hayne (Dr. Hayne), state pathologist, conducted the autopsy on Pernell's body. Dr. Hayne testified that Pernell died from a gunshot wound. The bullet entered the chest cavity and traveled from Pernell's front left side through the body on an essentially horizontal plane without deviation up or down and then ***715** traveled from front to back at approximately 40 to 50 degrees. Once the bullet entered the chest cavity, it fractured the fourth left rib. The bullet traveled through the left lung and the two chambers of the heart. After the bullet traveled through the left ventricle and the left atrium, it went through the aorta. The bullet left the heart and traveled from the aorta to enter the right lung. The bullet struck the 7th posterior right rib on the right flank, fracturing that bone before it came to rest.

¶ 17. The bullet caused extensive internal bleeding. There were one and one half quarts of blood in the right chest cavity, approximately one and one half quarts of blood in the left chest cavity, and one cup of blood in the structure that holds the heart's pericardial sac. Dr. Hayne testified that blood displacement of that magnitude would create irreversible shock that would cause death without immediate medical intervention. Dr. Hayne estimated that irreversible shock would have occurred within five to ten minutes.

¶ 18. Dr. Hayne retrieved the bullet and transported it under a chain of custody to the Mississippi State Crime Lab in Jackson to the firearms division for analysis. Dr. Hayne concluded the manner of death to be homicide due to a gunshot wound. On cross-examination, Dr. Hayne testified that there was no evidence of a struggle, lacerations, contusions or scratches. However, on redirect, Dr. Hayne testified that he could not preclude the possibility of a struggle, only that there was no evidence of a struggle.

¶ 19. Starks Hathcock (Hathcock), a forensic scientist specializing in firearms identification with the Mississippi Crime Lab, performed a ballistics examination on the gun recovered from Shaw's residence, the bullet retrieved by Dr. Hayne, and the cartridge case recovered from the crime scene. Hathcock fired and retrieved bullets fired from the Larcin .380 caliber handgun recovered from Shaw's residence to compare to the bullet recovered from Pernell's body. Hathcock examined the class characteristics and individual characteristics to that firearm. Hathcock concluded that the .380 caliber handgun recovered and submitted to the crime lab was the firearm that fired the bullet recovered from Pernell. To examine the recovered cartridge case, Hathcock compared the cartridge case to the markings on the breach case of the firearm. Hathcock found that the markings on the cartridge case bore class characteristics consistent with the firearms, but he did not find specific characteristics consistent with that firearm to positively include or exclude it as being fired from that gun.

¶ 20. On appeal, Howell raises the following issues for consideration by this Court:

I. Whether the trial court erred in denying a change of venue.

II. Whether the trial court erred in denying Howell access to county funds in order to employ an investigator, a jury consultant, a daily transcript, and additional counsel to assist with his defense.

III. Whether the trial court erred in failing to quash the jury panel.

IV. Whether the trial court erred in finding that the State's use of peremptory strikes did not violate *Batson*.

V. Whether the trial court erred in denying Howell's request for individual sequestered voir dire.

VI. Whether the trial court erred in limiting Howell's voir dire examination.

***716 VII. Whether the trial court erred in admitting Rice's eyewitness identification testimony.**

VIII. Whether the trial court erred in admitting Howell's statement.

IX. Whether the trial court erred in allowing witnesses to testify as to statements that Howell made.

X. Whether the trial court erred in allowing Shaw to testify as to statements made by co-defendant, Ray.

XI. Whether the trial court erred in refusing to allow Howell to re-cross- examine Shaw after the State's re-direct examination.

XII. Whether the trial court erred in denying Howell's request for a directed verdict.

XIII. Whether the trial court erred in granting the State's instruction S-2, which referred to attempted robbery; and whether Mississippi Code Annotated, Section 97-3-19 does not specifically enumerated attempted robbery as an underlying offense for conviction of capital murder.

XIV. Whether the trial court erred in granting the State's instruction S-6 which did not instruct the jury on simple murder and manslaughter; and whether the trial court erred in denying Howell's instructions D-13 and D-18 on the crime of simple murder and manslaughter.

XV. Whether the trial court erred in denying instruction D-3 on the weight of the evidence.

XVI. Whether the trial court erred in denying instruction D-8 on the jury's consideration of

testimony of a law enforcement officer.

XVII. Whether the trial court erred in denying instruction D-16 as to cross- racial eyewitness identification.

XVIII. Whether the trial court erred in denying Howell's motion for a mistrial and renewed motion for change of venue based upon a juror's father allegedly sitting on front row of audience with victim's family.

XIX. Whether the trial court erred in allowing the district attorney, in closing argument, to refer to Howell's failure to tell somebody about his alibi defense or give details.

XX. Whether the trial court erred in denying a twenty-four (24) hour "cooling off" period before the jury considered sentencing.

XXI. Whether the trial court erred in the sentencing phase by allowing evidence of Howell's previous conviction for possession of marijuana as an aggravating factor.

XXII. Whether the trial court erred in the sentencing phase by allowing evidence of fees due from Howell during his probation as double use of the same robbery element and pecuniary gain element in the guilt and sentencing phase.

XXIII. Whether the trial court erred in the sentencing phase by allowing the introduction of the indictment against Howell on a charge of sale of controlled substance, marijuana.

XXIV. Whether the trial court erred in granting sentencing instruction S-2 because it allegedly removed the issue of sympathy and mercy from consideration by the jury, improperly listed aggravating *717 factors of imprisonment and pecuniary gain, and failed to instruct the jury on how to properly weigh mitigating factor against aggravating facts and define what mitigating and aggravating factors are.

XXV. Whether the trial court erred in denying Howell's sentencing instruction.

XXVI. Whether the trial court erred in the sentencing phase by allowing the district attorney to refer to the victim, Pernell, his work, his loss, and what Pernell might say if he were still alive.

XXVII. Whether the trial court erred in denying Howell's post-trial motion for a new trial.

XXVIII. Whether the imposition of the death penalty is excessive or disproportionate in this case.

DISCUSSION

I. Change of Venue

¶ 21. Howell contends that the trial court erred by denying his request for a change of venue. Howell's motion was supported by six newspaper articles: (1) dated May 16, 2000, from the *Tupelo Daily Journal,* which described the crime, victim, and community reaction, but did not name Howell; (2) dated May 31, 2000, from the *Tupelo Daily Journal,* which reported on a totally separate crime and briefly referred to this crime, but did not name Howell; (3) dated May 17, 2000, from the *Tupelo Daily Journal,* which reported on the arraignment of the three co-defendants and the details of the crime, contained pictures of the three co-defendants, and stated that the court appearance was emotional for the victim's family and the defendants' families; (4) dated May 17, 2000, from the *Southern Sentinel,* which reported the details of the crime; (5) dated May 17, 2000, from the *New Albany Gazette,* which reported the details of the crime and contained pictures of the victim and the three co-defendants and was re-run on May 19, 2000; and (6) dated May 19, 2000, from the *New Albany Gazette,* which reported on the details of the crime, funeral preparations, and community reaction.

¶ 22. Additionally, Howell submitted seven identical brief affidavits, which stated that Howell could not receive a fair and impartial trial in Union County. Howell also introduced a videotape of a WTVA television newscast. Although Howell did not submit his own affidavit, as statutorily required, the

trial court allowed Howell to state in the record his desire for a change of venue.

¶ 23. The State called four witnesses to testify in response to Howell's motion: (1) Tom Cooper (Cooper), Chancery Clerk of Union County; (2) Danny Barnes (Barnes), Second District Supervisor of Union County; (3) Thomas Stanford (Stanford), retired Circuit Clerk of Union County; and (4) Norman Treadway (Treadway), Fourth District Supervisor of Union County. Each witness testified that Howell could receive a fair and impartial trial in Union County.

¶ 24. Specifically, Cooper testified that in his capacity as chancery clerk he dealt with a wide assortment of people from all over Union County. Prior to becoming chancery clerk, Cooper had worked at the Union Grocery Company and served as Mayor of New Albany. Cooper stated that he considered himself to be fairly well informed as to what is happening in the county. Cooper testified that until he was contacted about testifying, it had been several months since he had heard anything about Howell's case. Cooper had not personally heard anybody threaten Howell, ***718** express ill will towards Howell or prejudice towards his case.

¶ 25. Barnes testified that he had lived in Union County for thirty-six years and knew a lot of people in the county both inside and outside of the second district. Before becoming a supervisor, Barnes had served as a policeman, a deputy sheriff and a constable. As a member of the Board of Supervisors, Barnes testified that he had continuous dealings with people in the county and considered himself to be a well-informed resident of Union County. Barnes did not recall any media coverage concerning Howell's case since the days immediately following Pernell's death. Barnes did not believe that Pernell was well known within the county outside of New Albany. He had not heard any ill will expressed toward Howell by people in his district.

¶ 26. On cross-examination, Barnes testified that after Pernell's murder had first occurred, he had heard some comments within New Albany like "they shouldn't be given a trial." On redirect, Barnes testified that he believed that because of his law enforcement experience, people would be more likely to ask him about the case or talk to him about the case. However, people in his district had not talked to him about the case. No one had expressed to him any opinion about how this case should "turn out."

¶ 27. Stanford testified, that as the former circuit clerk for Union County, he dealt with a wide assortment of people and continued to stay in contact with people all over the county. At the time of the incident, people were concerned about the case and there was news coverage. However, several days following Pernell's death, there was very little news coverage. Stanford had not seen any newspaper articles in the last month before trial or any recent news coverage. Stanford also testified about his experience as circuit clerk and that the jury pool is selected randomly from the county's list of registered voters.

¶ 28. On cross-examination, Stanford testified that he had heard people express sympathy for both the Pernell and Howell families. He knew Howell's father, Reverend James Howell (Rev. Howell), and thought a lot of the family. Stanford heard that Howell was on probation for a drug-related offense when the incident occurred, but he could not testify as to whether people out in the county had heard about a drug conviction.

¶ 29. Treadway testified that he had been a supervisor in the eastern part of Union County since 1982. Initially there was some news coverage concerning Pernell's death, but Treadway had not read anything about it in the last two months before trial. Treadway heard very little mention of Pernell's

death in his part of the county. As supervisor for nineteen years, Treadway knew a lot of people in Union County. Treadway had not heard anyone express any ill will toward Howell or prejudgment of the case.

[1] [2] ¶ 30. The decision to grant a venue change rests in the sound discretion of the trial judge. *Hoops v. State,* 681 So.2d 521, 526 (Miss.1996) ; *Johnson v. State,* 476 So.2d 1195, 1208 (Miss.1985) ; *Winters v. State,* 473 So.2d 452, 457 (Miss.1985) ; *Cabello v. State,* 471 So.2d 332, 339 (Miss.1985) . This Court will not disturb the ruling of the trial court where the sound discretion of the trial judge in denying a change of venue was not abused. *Burrell v. State,* 613 So.2d 1186, 1190 (Miss.1993) ; *Harris v. State,* 537 So.2d 1325, 1328 (Miss.1989) ; *White v. State,* 495 So.2d 1346, 1349 (Miss.1986) .

¶ 31. In *Davis v. State,* 767 So.2d 986, 993 (Miss.2000) , this Court held that "[a] motion for change of venue 'must be in ***719** writing and supported by affidavits of two or more credible persons showing that the defendant cannot receive an impartial and fair trial in that particular county because of prejudgment of the case or grudge or ill will to the defendant in the mind of the public.' " (citing *Hoops,* 681 So.2d at 526).

[3] [4] ¶ 32. The right to a fair trial by an impartial jury is guaranteed by both the federal and state constitutions. *Johnson,* 476 So.2d at 1208 (citing U.S. Const. Amend. VI and Miss. Const. art. 3, § 26). "The accused has a right to a change of venue when it is doubtful that an impartial jury can be obtained." *Davis,* 767 So.2d at 993 (citing *White,* 495 So.2d at 1348). "[U]pon proper application, there arises a presumption that such sentiment exists; and, the state then bears the burden of rebutting that presumption." *Johnson,* 476 So.2d at 1211 .

[5] ¶ 33. This Court enumerated "certain elements which, when present would serve as an indicator to the trial court as to when the presumption is irrebutable." *White,* 495 So.2d at 1349. The elements are as follows:
(1) capital cases based on considerations of a heightened standard of review;
(2) crowds threatening violence toward the accused;
(3) an inordinate amount of media coverage, particularly in cases of
(a) serious crimes against influential families;
(b) serious crimes against public officials;
(c) serial crimes;
(d) crimes committed by a black defendant upon a white victim;
(e) where there is an inexperienced trial counsel.
Id.; Davis, 767 So.2d at 993-94; *Baldwin v. State,* 732 So.2d 236, 241 (Miss.1999) ; *Burrell,* 613 So.2d at 1189-90 .

¶ 34. In the case sub judice, Howell filed a motion for a change of venue accompanied by seven affidavits. He claims that the "alleged murder [of Pernell] evokes great passion and prejudice in this community." Howell's motion contended that a jury empaneled in a case of an assaultive crime by blacks against whites in Union County, a largely rural, small county with a majority white population, would follow a "long tradition" of convicting "on almost any evidence to serve as a deterrent to blacks." Howell's motion stated that the people of a largely rural county such as Union County would "naturally have fears and apprehensions of murder cases." The trial court conducted a hearing on Howell's motion for change of venue. Howell testified at the change of venue hearing that he thought that he could not receive a fair trial in Union County.

¶ 35. The State then had the burden of rebutting the presumption. *See Johnson,* 476 So.2d at 1211. In support of its position, the State called the four witnesses, Cooper, Barnes, Stanford and Treadway, to testify. None of the State's witnesses testified to having any knowledge of any grudge or ill will toward Howell, threats against Howell or prejudgments of the case. Within the last months prior to trial, none of the State's witnesses had heard any publicity about the case. The State rested and Howell offered no additional evidence to support his position. The trial court withheld ruling on the change of venue motion until it could review a tape of a newscast and transcript of the newscast prepared by WTVA offered by the defense and the affidavits filed to support Howell's motion. In denying Howell's motion for change of venue, the trial court stated, ***720** "having considered the affidavits and exhibits filed on behalf of the defendant and the testimony presented the [c]ourt finds that the State has overcome the presumption raised by the filing of the affidavits seeking change of venue...."

[6] ¶ 36. Given the facts surrounding this issue, we find that Howell did not demonstrate an abuse of discretion by the trial court's denial of the motion for change of venue. There was no evidence offered of any threatened violence towards Howell, nor an inordinate amount of media coverage. The testimony of the State's witnesses demonstrated that Howell could receive a fair trial. Upon the conclusion of testimony from the State's witnesses, Howell offered no additional evidence to rebut the State's witnesses and support his motion.

[7] ¶ 37. Finally, Howell did not present any evidence that he could not or did not receive a fair trial from twelve jurors who heard his case. Because a large number of the venire panel had read about the case in the newspaper, the trial judge questioned the entire panel to determine whether anyone had formed or expressed an opinion concerning the guilt or innocence of Howell based on anything they may have read, heard or seen in the media. The trial court informed the venire panel that if they had not already responded to the trial court's prior questions concerning media coverage, they must respond at that time if anything they had read, heard or seen would affect their decision. The trial court informed the panel that their responses were being made under oath. No venire member responded that they had formed or expressed an opinion as to Howell's guilt. No venire member expressed that they had any personal knowledge of the case or had been pressured by anyone on how to vote. "The linchpin is whether the venire members stated that they could be fair and impartial jurors if chosen." *Simon v. State,* 688 So.2d 791, 803 (Miss.1997) . Based on the evidence in the record, we find that the trial court did not abuse its discretion in denying the motion for change of venue. Accordingly, this issue is without merit.

II. Failure to Grant Howell County Funds For His Defense

¶ 38. Howell contends that the trial court erred in denying funds for his defense to hire: (1) an investigator; (2) a jury consultant; (3) limited daily transcripts; (4) additional counsel; and (5) additional psychiatric evaluation. At trial, Howell did not proceed as a pauper and accordingly he did not have court-appointed counsel. Howell's attorney was retained and chose to handle the case on a pro bono basis as a favor to Howell's father.

A. Investigator

[8] ¶ 39. Terry Cox (Cox) conducted an investigation on Howell's behalf. Rev. Howell testified that Cox was employed and compensated from donations received from friends. Cox testified that his investigation was limited due to available funds. Howell's family was having trouble paying for his services. Cox had primarily been able to interview the State's witnesses, but he was not able to

conduct any investigation into any possible mitigating issues. The trial court denied Howell's motion for funds for an investigator. The trial court stated that:
The court is of the opinion that there has not been any showing that the defendant has been or is being denied a fair opportunity to present [its] defense based on what the court has before it.
This issue is without merit.

B. Jury Consultant

¶ 40. Howell further contends that the trial court erred in denying his request for ***721** a jury consultant. Rev. Howell testified that he did not have the funds available to hire a jury consultant to help pick Howell's jury. As pastor of Bethlehem Baptist Church in Tippah County for approximately twenty years, Rev. Howell did not have much contact with people outside of his church. Furthermore, Howell's attorney asked the trial court to take notice that he was not from Union County; and therefore, he would not be familiar with a venire panel drawn from Union County. On cross-examination, Rev. Howell testified that he had a lot of relatives in Union County, grew up in New Albany and also graduated from a school in New Albany. Howell testified that besides the nine years that he lived in Starkville he had lived in New Albany until 1998. The trial court denied Howell's motion for a jury consultant.

¶ 41. This Court has stated:
[T]he Fifth Circuit has recently held that the right of an indigent to a court-appointed psychiatric expert does not extend to a right to a jury- selection expert. *Moore v. Johnson,* 225 F.3d 495, 503 (5th Cir.2000) . There, the court noted that a "defendant cannot expect the state to provide him a most-sophisticated defense; rather, he is entitled to 'access to the raw materials integral to the to the building of an effective defense.' " *Moore,* 225 F.3d at 503 (citing *Ake v. Oklahoma,* 470 U.S. 68, 77, 105 S.Ct. 1087, 84 L.Ed.2d 53(1985)).
Grayson v. State, 806 So.2d 241, 255 (Miss.2001) (emphasis added).

¶ 42. This Court has further analyzed an indigent's right to defense expenses to hire experts, stating:
An indigent's right to defense expenses is "conditioned *upon a showing that such expenses are needed needed to prepare* and present an adequate defense." *Ruffin v. State,* 447 So.2d 113, 118 (Miss.1984) . Concrete reasons for requiring an expert must be provided by the accused. *Hansen v. State,* 592 So.2d 114, 125 (Miss.1991) .
In determining whether a defendant was denied a fair trial because of failure to appoint or allow funds for an expert, some of the factors to consider are whether and to what degree the defendant had access to the State's experts, whether the defendant had the opportunity to cross-examine those experts, and lack of prejudice or incompetence of the State's experts. *Fisher v. City of Eupora,* 587 So.2d 878, 883 (Miss.1991) . We have also considered to what extent the State's case depends upon the State's expert, *Tubbs v. State,* 402 So.2d 830, 836 (Miss.1981) , and the risk of inaccuracy in resolving the issue for which the expert is requested. *Johnson v. State,* 529 So.2d 577, 592 (Miss.1988) .
Green v. State, 631 So.2d 167, 171-72 (Miss.1994) .

[9] [10] ¶ 43. Since Howell did not proceed as an indigent or have the trial court declare him to be an indigent, there is no authority to require the State to fund his request for defense expenses. Furthermore, based on this Court's holdings in *Grayson* and *Green,* Howell's argument that his father's lack of contact with Union County required a jury consultant is unpersuasive. This issue is without merit.

C. Limited Daily Transcripts

¶ 44. Howell requested that the trial court make the county responsible for providing the defense with a copy of daily transcripts of the testimony of co- defendants, Ray and Lipsey, and the testimony of secondary witnesses, Shaw, Powell and Rice. The trial court stated:
The Court is not going to order that the county pay for it [daily transcripts]. ***722** But if you want to make some arrangements with Mrs. Fair [the court reporter] that is between you and your client and Mrs. Fair.

[11] ¶ 45. Howell was not precluded by the trial court from obtaining the daily transcripts nor did Howell demonstrate that he had been denied access to daily transcripts by the court reporter. Furthermore, Howell offers this Court no authority which requires the State to furnish a criminal defendant with daily transcripts. We find no manifest injustice or any abuse of discretion in the trial court's denial of Howell's request for daily transcripts. *See Ruffin v. State,* 481 So.2d 312, 314-15 (Miss.1985) (trial court did not abuse its discretion in denying an indigent defendant with a transcript of the prior trial which ended in mistrial).

D. Additional Counsel

¶ 46. Howell also requested that the State furnish additional counsel to assist Howell's retained counsel in handling his case. Before denying Howell's request for additional counsel, the trial court requested supporting authority. Howell offered no authority to the trial court, nor does Howell offer any authority on appeal. The trial court ruled:
I think you [defense counsel] are very good but, I don't know of any authority this court would have to appoint somebody. So I'm going to deny your motion.

¶ 47. Furthermore, the record reflects that a second attorney, Jak Smith, assisted in Howell's case at various stages: voir dire, jury selection, arguments involving evidentiary matters, questioning of witness, arguments on jury instructions and closing arguments. Jak Smith is also listed in Howell's certificate of interested persons as attorney for the defendant/appellant.

[12] [13] ¶ 48. We find that the trial court did not err by refusing to furnish Howell a court-appointed attorney to assist his retained counsel. The constitution does not require the appointment of two attorneys in a case where the death penalty is involved. In *Bell v. Watkins,* 692 F.2d 999, 1009 (5th Cir.1982) , the court stated that "[a]lthough Mississippi courts may customarily appoint two lawyers in a capital case, the constitution dictates no such requirement." This assignment of error is without merit.

E. Additional Psychiatric Examination

¶ 49. Finally, Howell claims that the trial court erred in not allowing funding for additional psychiatric examination. Howell had already received, by agreement between the parties, a psychiatric examination from Dr. Louis Masseur (Dr. Masseur). Howell relies on Dr. Masseur's comment in his notes that Howell suffered slight distortion of reality as to the facts. Howell introduced a copy of Dr. Masseur's handwritten notes indicating what he would charge for an additional hour on the mitigating factors. The trial court ruled that based on what it had seen and heard, further funding for additional psychiatric examination was not warranted.

¶ 50. Howell cites *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) , in support of his position. In *Ake* the United States Supreme Court determined that "when a defendant

demonstrates to the trial judge that his sanity at the time of the offenses to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense." 105 S.Ct. at 1096 .

***723** ¶ 51. We find that Howell's reliance on *Ake* is misplaced as he did not raise an insanity defense at trial. *See Cole v. State,* 666 So.2d 767, 781 (Miss.1995) . In *Cole,* the defendant's post-conviction relief appeal from the affirmance of his conviction and death sentence relied upon *Ake* contending that he had been deprived due process and equal protection, as well as, his Fifth, Sixth and Eighth Amendment rights. This Court determined that since sanity was not an issue, Cole was not entitled to additional mental examination.

¶ 52. This Court has considered a similar argument raised by an indigent defendant and held:
A defendant is not entitled to a psychological expert where he has not raised insanity as a defense or where the State does not plan to submit psychological evidence against the defendant. *Ladner v. State,* *State,* 584 So.2d 743, 757 (Miss.1991) ; *Nixon v. State,* 533 So.2d 1078, 1096 (Miss.1987) . As we have stated, "[w]here a defendant offers no more 'than undeveloped assertions that the requested assistance would be beneficial,' no trial court is under an obligation to provide him with fishing equipment." *Griffin v. State,* 557 So.2d 542, 550 (Miss.1990) (quoting *Caldwell v. Mississippi,* 472 U.S. 320, 323 n. 1, 105 S.Ct. 2633, 2637 n. 1, 86 L.Ed.2d 231 (1985)).
Bishop did not raise an insanity defense; he offered no facts which would show that there was a need to develop mitigating evidence based on psychological problems; and he underwent a thorough psychological evaluation performed at the State Hospital which produced not mitigating evidence.
We therefore find, that Bishop was not entitled to a psychological expert for the purpose of developing mitigating evidence.
Bishop v. State, 812 So.2d 934, 939-40 (Miss.2002) .

[14] ¶ 53. As Howell did not proceed as an indigent or raise insanity as a defense, we find that the trial court did not err in denying his request for additional psychiatric examinations. This assignment of error is without merit.

III. Jury Panel Selection

¶ 54. Howell raises two arguments on appeal as to the selection process involved in composing the jury wheel used to draw Howell's prospective jurors. The circuit clerk testified that at the time of Howell's jury draw, the jury wheel consisted of 1,195 prospective jurors. The jury wheel had originally consisted of the names of 3,000 qualified electors selected from the roughly 16,200 qualified electors in Union County. Each time a jury panel was selected, the circuit clerk removed those names from the wheel and they were not available for selection at the next draw. Howell contends that the trial court erred by not quashing the jury panel because he was denied a jury from a "fair cross section of the community." However, Howell admits that the circuit clerk followed the procedure dictated in Miss.Code Ann. §§ 13-5-10 & -12 (Rev.2002). Therefore, we find that the circuit clerk clearly complied with the dictates of Miss.Code Ann. §§ 13-5-10 and 13-5-12 . This issue is without merit.

¶ 55. Howell next contends that prohibiting the selection of jurors under the age of 21 years old pursuant to Miss.Code Ann. § 13-5-1 (Rev.2002) constitutes intentional discrimination against persons who are 18 to 20 years old.

¶ 56. This Court has repeatedly rejected this argument.
This Court has previously considered the exclusion of persons under age 21 ***724** from jury service and has consistently held that the exclusion does not violate the state or federal constitution. *Turner v. State,* 573 So.2d 657, 666 (Miss.1990) , rev'd on other grounds; *Irving v. State,* 498 So.2d 305, 319 (Miss.1986) , cert. denied, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 826 (1987) ; *Fermo v. State,* 370 So.2d 930, 934 (Miss.1979) ; *Joyce v. State,* 327 So.2d 255, 261 (Miss.1976) ; *Johnson v. State,* 260 So.2d 436, 437 (Miss.1972) .
Milano v. State, 790 So.2d 179, 188 (Miss.2001) . *See Jordan v. State,* 786 So.2d 987, 1024 (Miss.2001) . Therefore, we find that this argument is also without merit. The circuit clerk properly followed the statutes of this State in drawing and selecting Howell's jury.

IV. *Batson*

¶ 57. Howell contends that the trial court erred by allowing the State to exercise its peremptory challenges on two black members of the venire, namely Juror 34 (High) and Juror 68 (Wade). The record reflects that the State exercised a total of 12 peremptory challenges, 11 on the jury panel and 1 on the alternates. The jury was selected, and the trial court recessed for lunch.

¶ 58. Howell did not raise a contemporaneous objection to the State's use of its two peremptory challenges as to Juror 34 and 68. However, the record indicates that, prior to resuming court and empaneling the jury, Howell's counsel requested "that the State provide race neutral reasons for disqualifications of two jurors (Jurors 34 and Juror 68) under *Batson.* " The record reflects the following exchange occurred:
State: Your Honor. I don't know if they made out a prima facia case of racial discrimination. Nevertheless without waiving our argument. I would state as our reason to first of all there are only three African American remaining on the entire panel. I exercised 12 strikes, two of which were of African American. First strike that I exercised was on juror number 34. He was a black male Lavorigia High, [J]unior. Mr. High has had several arrests here actually on his jury questionnaire he has had a recent public drunk and he is the Highs and the Fosters are related. He didn't state anything about being related. That is information that I have gathered from some of the law enforcement. And the main reason is when I left here two weeks ago from the 60 motions that we went through some woman ran into me. It happened in front of Mr. High's house. Mr. High's brother came out and he was first one out there. Mr. High was out there and I believe they saw the wreck but when I sent the officers over there the brother stayed outside and you can see him inside the screen and he wouldn't tell them that he saw it. So that is our reasons for having striken him.
The Court: Let me hear you on your next one. The other one was.
The Court: Number 68.
State: Anthony Wade. Anthony Wade is an African American. Who put down on his jury questionnaire that he had never been arrested for a crime when I have right here warrants that were issued for receiving stolen property out of Lee County where he was arrested. Yes, here is a copy of his arrest record of Anthony Wade in Lee County for receiving stolen property. There were some guns in that case arose out of stolen here in Union County that wound up in the possession of ***725** Anthony Wade and he did not state that he had been arrested. And I have the arrest record here available. You can make it a part of this record so therefore we believe that he was not forth coming in his jury questionnaire and that his criminal activity would prevent him from being a fair and impartial juror. And that was our main reason for striking him but also I assume defense counsel would have striken him because he testified that if the county coroner Mark Golden testified he would follow his testimony.
The Court: All right. The court is satisfied of the race neutral reasons even though I don't think there

has been any pattern of racial discrimination. But I think it would be sufficient. Anything else before we go now.

[15] [16] ¶ 59. A reversal will only occur if the factual findings of the trial judge appear to be "clearly erroneous or against the overwhelming weight of the evidence." *Tanner v. State,* 764 So.2d 385, 393 (Miss.2000) (citing *Stewart v. State,* 662 So.2d 552, 558 (Miss.1995)); *Davis v. State,* 551 So.2d 165, 171 (Miss.1989) . "On appellate review, the trial court's determinations under *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) , are accorded great deference because they are based, in a large part, on credibility." *Coleman v. State,* 697 So.2d 777, 785 (Miss.1997) (citing *Lockett v. State,* 517 So.2d 1346, 1349 (Miss.1987)). The term "great deference" has been defined in the *Batson* context as meaning an insulation from appellate reversal any trial findings which are not clearly erroneous. *Lockett v. State,* 517 So.2d at 1349 .

[17] ¶ 60. In *Batson,* the United States Supreme Court held that a peremptory challenge cannot be used to exclude venire-persons from jury service based on their race. *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) . A peremptory challenge based on race constitutes a violation of equal protection. *Id.* at 98, 106 S.Ct. 1712.

[18] ¶ 61. The necessary steps to resolve a peremptory challenge based upon *Batson* are cited in *Stewart v. State,* 662 So.2d 552, 557-58 (Miss.1995) , as follows:
1. The party objecting to the peremptory challenge must first make a prima facie showing that race was the criteria for the exercise of the peremptory challenge.
2. If this initial showing is successful, the party desiring to exercise the challenge has the burden to offer a race-neutral explanation for striking the potential juror.
3. The trial court must then determine whether the objecting party has met their burden to prove there has been purposeful discrimination in the exercise of peremptory challenges.
To establish the first prong, a prima facie case under *Batson,* the objecting party must show (1) that he/she is a member of a "cognizable racial group," (2) the prosecutor has exercised peremptory challenges toward the elimination of prospective jurors of his race, and (3) the facts and circumstances raised an inference that the prosecutor used his peremptory challenges for the purpose of striking minorities. *Conerly v. State,* 544 So.2d 1370, 1376-77 (Miss.1989) .

[19] [20] ¶ 62. In the case sub judice, a review of the record demonstrates that the State provided race neutral reasons for striking juror 34 and 68. Great deference is afforded to a trial court's ruling. Therefore, this issue is without merit.

***726 V. Individual Sequestered Voir Dire**

¶ 63. Howell contends the trial court erred in denying his request to conduct individual sequestered voir dire of prospective jury members who had read articles or seen information about the case on televsion. Howell wanted to question these prospective jurors as to their knowledge of any facts concerning the "alleged" robbery and Howell's previous drug conviction that appeared in newspaper articles. The trial court concluded that Howell's counsel had questioned the prospective jurors 13, 85, 88, 106, 126, 127, 146 and 153 at issue, who indicated they had heard about the case.

¶ 64. Howell's counsel had generally questioned them as to whether they would have to hear strong evidence to contradict what they had seen or heard. The trial court took a recess. In chambers, Howell's counsel requested individual sequestered voir dire. The trial court ruled that Howell's counsel could ask more narrow questions in general voir dire in order to elicit the information.

¶ 65. Furthermore, each juror had completed juror questionnaires which asked questions to determine if they had ever heard of Marlon Howell or his family; Adam Ray or his family; and Curtis Lipsey or his family. The questionnaires asked the jurors to "[p]lease explain what you know about" each of these individuals. Therefore, each juror had been individually questioned as to any prior knowledge of Howell.

¶ 66. More importantly, the record further reflects that prospective jurors 13, 85, 88, 106, 126, 127, 146 and 153 in question did not end up serving on the jury. Jurors 13, 88 and 126 were excused for cause at Howell's request. At the time of the request for individual sequestered voir dire, juror 106 had already been excused from the panel. After the request, the parties agreed to strike juror 85. Jury selection did not reach jurors 127, 146 and 153. They did not serve on the jury or as alternates, and they were never tendered for possible service on the jury.

¶ 67. This Court has held that voir dire "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." *Ballenger v. State,* 667 So.2d 1242, 1250 (Miss.1995) (citing *Morgan v. Illinois,* 504 U.S. 719, 729, 112 S.Ct. 2222, 2230, 119 L.Ed.2d 492 (1992) , citing *Ristaino v. Ross,* 424 U.S. 589, 594, 96 S.Ct. 1017, 1020, 47 L.Ed.2d 258 (1976)) (quoting *Connors v. United States,* 158 U.S. 408, 413, 15 S.Ct. 951, 953, 39 L.Ed. 1033 (1895)). *See also Foster v. State,* 639 So.2d 1263, 1274 (Miss.1994) . This Court has stated that the trial court should take a substantial role in conducting *Witherspoon* voir dire of the venire panel in capital cases. *Ballenger v. State,* 667 So.2d at 1250; *see Hansen v. State,* 592 So.2d at 128-29; *Lockett v. State,* 517 So.2d at 1335 .

¶ 68. Rule 3.05 of the Uniform Circuit and County Court Rules addresses voir dire examination of jurors:

In the voir dire examination of jurors, the attorney will question the entire venire only on matters not inquired into by the court. Individual jurors may be examined only when proper to inquire as to answers given or for other good cause allowed by the court. No hypothetical questions requiring any juror to pledge a particular verdict will be asked. Attorneys will not offer an opinion on the law. The court may set a reasonable time limit for voir dire.

[21] ¶ 69. "A jury selection procedure which gives the defendant 'a fair opportunity to ask questions of individual jurors which may enable the defendant to determine his right to challenge that juror' is proper." ***727** *McLemore v. State,* 669 So.2d 19, 25 (Miss.1996) (quoting *Peters v. State,* 314 So.2d 724, 728 (Miss.1975)).

[22] ¶ 70. "The trial court has broad discretion in passing upon the extent and propriety of questions addressed to prospective jurors." *Stevens v. State,* 806 So.2d 1031, 1062 (Miss.2001) . *See also McGilberry v. State,* 741 So.2d 894, 912 (Miss.1999) ; *Davis v. State,* 684 So.2d 643, 651-52 (Miss.1996) ; *Jones v. State,* 381 So.2d 983, 990 (Miss.1980) .

[23] ¶ 71. We find nothing in the record that supports Howell's contention that the trial court erred by denying his request to conduct individual sequestered voir dire. None of the prospective jurors whom Howell sought to individually voir dire actually served on the jury that was seated. Finally, Howell presents no evidence of any harm or prejudice which resulted because of the denial for individual voir dire. *See Stevens,* 806 So.2d at 1054. This issue is without merit.

VI. Voir Dire Examination

[24] ¶ 72. During voir dire, Howell sought to question jurors as to whether or not they had ever seen or heard of police officers "puffing up" or giving untrue testimony about the facts of a case. The State objected to this line of questioning which was sustained by the trial court. The "puffed testimony" question was proposed to Juror 153 (Whiteside). The question posed by the defense did not involve the facts of the case sub judice.

[25] [26] ¶ 73. Next, Howell questioned Juror 98 (Nobles) about his feelings against the death penalty and the type of cases in which he might vote for the death penalty. The State objected to the question, and it was sustained by the trial court. Howell finally questioned the jurors concerning whether they believed mercy should be a factor in considering a death penalty sentence. The State objected to this question, and the objection was sustained by the trial court.

¶ 74. The only authority provided by Howell in support of his argument, that the trial court erred in restricting voir dire of the jury panel, is the general concept that the trial court has the responsibility to control the voir dire process. Howell cites *Mack v. State,* 650 So.2d 1289, 1304 (Miss.1995) , which states, "[t]rial courts have a responsibility to control voir dire but in doing so they must take care not to hinder a full exploration of a juror's predisposition by hypothetical or otherwise." (citing *Dennis v. United States,* 339 U.S. 162, 171, 172, 70 S.Ct. 519, 523-524, 94 L.Ed. 734 (1950)).

[27] [28] [29] ¶ 75. Voir dire "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." *Ballenger v. State,* 667 So.2d at 1250-51 (citing *Morgan v. Illinois,* 504 U.S. at 729, 112 S.Ct. 2222). *See also Foster v. State,* 639 So.2d at 1274. "The standard of review in examining the conduct of voir dire is abuse of discretion." *Jackson v. State,* 791 So.2d 830, 835 (Miss.2001) . Further, "[a]buse of discretion will only be found where a defendant shows clear prejudice resulting from undue lack of constraint on the prosecution or undue constraint of the defense." *Id.* at 835-36 (citing *Davis v. State,* 684 So.2d at 652). "A jury selection procedure which gives the defendant 'a fair opportunity to ask questions of individual jurors which may enable the defendant to determine his right to challenge that juror' is proper." *Stevens,* 806 So.2d at 1062 .

¶ 76. It is evident from the record that the trial judge did not abuse his discretion in sustaining the State's objection to Howell's three proposed questions. More importantly, however, is the fact that Howell ***728** was not harmed in any way by the trial court's rulings. None of the prospective jurors to whom the first two questions were directed actually served on the jury. [FN3]

FN3. Neither of the jurors whom Howell sought to question actually served on the jury. As stated previously, the jury selection never reached Juror 153 (Whiteside) so he was never tendered to the defense. Additionally, Juror 98 (Nobles) was tendered as an alternate and struck by the defense.

¶ 77. Lastly, the third question, concerning mercy, was directed to the entire venire panel. "This Court has repeatedly held that 'capital defendants are not entitled to a mercy instruction.' " *Goodin v. State,* 787 So.2d 639, 657 (Miss.2001) (citing *Jordan v. State,* 728 So.2d at 1099). "The United States Supreme Court has held that giving a jury instruction allowing consideration of sympathy or mercy could induce a jury to base its sentencing decision upon emotion, whim, and caprice instead of upon the evidence presented at trial." *Goodin,* 787 So.2d at 657. Accordingly, we find that since this Court has held that the jury is not entitled to be instructed to give mercy, then there is no error in the trial court's decision to disallow questioning prospective jurors on voir dire as whether they would provide mercy in sentencing.

¶ 78. The record does not indicate that the trial court abused its discretion or that Howell was denied a fair opportunity to conduct voir dire on any relevant issue. As such, Howell's arguments on this point are clearly without merit.

VII. Identification of Howell and Illegal Arrest

¶ 79. Howell contends that Rice's eyewitness identification should have been suppressed as the lineup was suggestive. The record reflects that a pretrial hearing was conducted on Howell's motion to suppress the identification testimony.

¶ 80. Rice testified that on the morning in question, he was in his living room watching television while he was getting ready for work. He heard a car horn, went to the window and pulled back the blinds. Rice had described the lighting conditions as "[p]re-dawn." Rice talked to Officer Kent at the scene that morning. He had identified the shooter as wearing a plaid flannel jacket that was open with a light colored t-shirt underneath and a pair of blue jeans. He did not notice the shooter's shoes.

¶ 81. Later that morning, at the police station, Rice gave a statement to Officer Kent and Chief Grisham. Rice stated that the shooter was wearing a red and black plaid flannel shirt. Howell contends that Rice misidentified him as wearing a long sleeve plaid red and black shirt as opposed to the green short sleeve shirt described by other witnesses. Rice told the police that the shooter was a black male. Rice left the police station and returned later that day to participate in a lineup upon being informed that three people had been arrested.

¶ 82. According to Rice, none of the officers gave a description of the defendant or made any suggestions as to his identity. Rice testified that there was nothing about the lineup that was suggestive. Rice described the lineup as follows:
I was in the small office with a desk and couple of chairs and I was kind of sitting on the edge of the desk squatting against it. There was a small window, yay high, yay wide and they told me that the men would be brought out one at a time. Take my time and if I can identify the gentleman that I saw the morning prior to let them know. When they came out they came out, said they would ***729** phase (face) me. Turn sideways and leave and then they would bring the next one out. They brought a total of six. But I didn't need to see all six them. When I saw the third person of the line up which was Mr. Howell, I identified him at that time.
When Rice proceeded to view the six people in the lineup, he identified Howell as the shooter.

¶ 83. Chief Grisham testified that the lineup was composed of six, young, black males, who were inmates. They were selected by a computer program to help choose similar size, race, age, and things of that nature. No one pressured Rice to identify Howell. Rice was not shown any photographs prior to the lineup.

¶ 84. Chief Grisham's testimony at trial reflected that the other five subjects in the lineup were Dominique Cannon, 6', 130 pounds; Robert Antron Carr, 5'10", 135 pounds; Romaro Dixon, 6', 145 pounds; Brad Marion, 6', 160 pounds; Robert Harris, 6'2", 185 pounds. Howell's arrest sheet reflects him to be 6'2", 175 pounds. However, Chief Grisham did place in the case file a photographic display of the people in the lineup. The picture was taken in an adjacent room, prior to the time the participants went into the lineup room. Two or three of the individuals in the lineup were as tall as Howell. Chief Grisham did not observe that Howell was the only one wearing tennis shoes.

¶ 85. The picture showed six young, black men, all of whom are wearing street clothes. The feet of

four of the six people in the lineup appear in the photograph. Of those four, Howell was the only one wearing sneakers. The other three men in the picture wore socks and sandals. Howell claims that the height, weight, skin tone and hair of the other people in the lineup were different than his appearance.

¶ 86. Rice specifically testified that he was not able to see the feet of the people in the lineup. The window that he was looking through "was up off the floor" and he was looking at people's faces. Rice testified that he did not pay attention to what they were wearing.

¶ 87. Howell was represented by a local attorney, Regan Russell (Russell), who was present at the lineup. Officer Kent was also present in the viewing room with Rice and Russell. Chief Grisham was not in the viewing room at the time the lineup was conducted.

¶ 88. After hearing this evidence and related argument, the trial court denied the motion to suppress, concluding that the lineup was proper and not tainted or suggestive.

¶ 89. In *White v. State,* 507 So.2d 98, 99-100 (Miss.1987) , this Court in upholding a lineup where the defendant was the only person with plaited hair, stated that:
In *York v. State,* 413 So.2d 1372 (Miss.1982) , this Court reviewed United States Supreme Court decisions addressing due process violations predicated on impermissibly suggestive lineups. The Court said:
An impermissibly suggestive pretrial identification does not preclude in- court identification by an eyewitness who viewed the suspect at the procedure, unless: (1) from the totality of the circumstances surrounding it (2) the identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
Even if testimony is proffered of the out-of-court identification itself, the same standard exists as to the above, with the omission of the word "irreparable."
***730** In determining whether these standards are fulfilled, *Neil v. Biggers* states the following may be considered:
... the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
409 U.S. at 199, 93 S.Ct. at 382 .
In the final analysis, under *Manson v. Brathwaite* [, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977)], "reliability is the linchpin in determining the admissibility ..."
York, 413 So.2d at 1383. *See Foster v. State,* 493 So.2d 1304 (Miss.1986) (Foster was the only member of the lineup wearing a distinctive fishing hat, and the Court rejected Foster's contention that the lineup was impermissibly suggestive); *Jones v. State,* 504 So.2d 1196 (Miss.1987) . (Jones was the only person in a photograph display wearing a cap similar to the one worn by the rapist, and the display was not so suggestive as to be impermissible).

¶ 90. In *Neil v. Biggers,* 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972) , the U.S. Supreme Court set out five factors to be considered in determining whether a lineup is impermissibly suggestive:
1. The opportunity of the witness to view the criminal at the time of the crime.
2. The witness's degree of attention.
3. The accuracy of the witness's prior description of the criminal.
4. The level of certainty demonstrated by the witness at the confrontation.
5. Length of time between the crime and the confrontation.

See White, 507 So.2d at 100 .

[30] ¶ 91. When the lineup is considered in light of the *Biggers* factors, it is evident that: (1) Rice's view of the shooter was brief [FN4] ; but, (2) he was paying very close attention, once he realized that a shooting had taken place; (3) he accurately described Howell as a young, clean cut, black male; (4) he was absolutely certain of Howell's identity when he saw him in the lineup; and (5) the lineup took place a little over 24 hours after the shooting. *See Biggers*, 409 U.S. at 199, 93 S.Ct. 375 .

FN4. Rice testified that it was "pre dawn," but he could see. Both vehicles had their lights on. The lights of the rear vehicle were shining on the shooter. The neighborhood was "well lit." There was a streetlamp right across the street from Rice's house and one at the end of the block. Rice's neighbor had a porch light on. Rice's view was unobstructed.

[31] ¶ 92. Howell was represented by counsel throughout the lineup procedure. Furthermore, the jury was instructed on how to consider eyewitness identification. [FN5] ***731** Under the totality of the circumstances, there is no likelihood whatsoever, that Rice's identification was not reliable. *See Biggers*, 409 U.S. at 199, 116, 93 S.Ct. at 382 ; *York*, 413 So.2d at 1383. Furthermore, this Court has repeatedly held that "the jury is the final arbiter of a witness's credibility." *See Williams v. State*, 794 So.2d 1019, 1028 (Miss.2001) ; *Morgan v. State*, 681 So.2d 82, 93 (Miss.1996) . The jury alone determines the weight and worth of any conflicting testimony. *Hicks v. State*, 812 So.2d 179, 194 (Miss.2002) . Rice's credibility as a witness at trial rests with the jury. Therefore, we find that this issue is without merit.

FN5. Instruction S-8 provided, in pertinent part:
Identification testimony is an expression of the belief or impression by the witness. You must judge its value and reliability from the totality of the circumstances surrounding the crime and the subsequent identification. In appraising identification testimony of a witness, you should consider the following:
1. Did the witness have an adequate opportunity to observe the offender?
2. Did the witness observe the offender with an adequate degree of attention?
3. Did the witness provide an accurate description of the offender after the crime?
4. How certain is the witness of the identification?
5. How much time passed between the crime and the identification?
If, after examining all of the testimony and the evidence, you have a reasonable doubt that Marlon Latodd Howell was the person who committed the crime, then you must find Marlon Latodd Howell is not guilty.
The defense indicated that this was a "good" instruction. The jury's verdict demonstrates how it resolved any issues about the identification.

¶ 93. Additionally, Howell contends that the identification was the result of an alleged illegal arrest. Howell alleges that the Field Officer's Warrant or "blue warrant" under which he was arrested was invalid.

¶ 94. Probation and Parole Officer Nance testified that the New Albany Police Department called him on the evening of May 15, 2000, to inquire whether the Mississippi Department of Corrections (MDOC) had a picture of Howell. Nance checked Howell's file and discovered that Probation and Parole Officer Mullins had entered a warrant for Howell's arrest into the computer, but Officer Mullins had not signed the warrant. Officer Nance telephoned Officer Mullins, and the record reflects that the following transpired:

I asked [Mullins] if we could go get the warrant, asked him if he had sent a copy of it to the Sheriff's department which he had not at that time to the best of my knowledge and asked if we could go ahead and get the warrant and serve it on him and go ahead and place him under arrest of the D O C for the violation that he had listed on his warrant. He said that will be fine, go ahead and get it. Chad Glasson, New Albany police officer and I went to the Tippah County Officer, looked in the file, found the warrant that Mr. Mullins had typed up. He had not signed the warrant but he had issued the warrant. I turned around and copied the warrant exactly as he had it. Put my name down there as the field officer and signed it. That way we would have truly valid warrant. That is the only reason that I issued the warrant instead of Chuck Mullins because he had not signed the warrant.

¶ 95. Officer Nance further explained that:
The administrative authority we have as field officers have t[illegible]ight to issue a field officer[']s warrant for a violation of probation, terms and conditions. We ar[illegible] to get a judge[']s warrant as soon as possible after the field officers warrant is issued. The reason that I signed it instead of Chuck [Mullins] is because he had not signed the field officer[']s warrant hisself. He had issued it, typed in his name but just had not signed it.

¶ 96. The warrant charged that Howell had violated his probation by "failure to avoid injurious or vicious habits, fail[ure] to pay supervision fees, fail [ure] to pay for positive urine screen fail[ure] to pay court ordered monies." Shortly after the warrant was issued, Howell was arrested and transported to the New Albany Police Department. The arrest warrant from Justice ***732** Court Judge Ronnie Rakestraw was obtained around noon on May 16, 2000.

¶ 97. The trial court ruled "that the arrest was in fact proper and that there wasn't anything illegal about it." Howell contends that Officer Nance did not have authority to sign the warrant which rendered an illegal arrest. Howell alleges that Officer Nance had no personal knowledge of the circumstances in the warrant.

[32] ¶ 98. Officer Nance clearly had the legal authority to issue the warrant. The applicable statute provides in pertinent part as follows:
Any probation and parole officer may arrest a probationer without a warrant, or may deputize any other officer with power of arrest to do so by giving him a written statement setting forth that the probationer has, in the judgment of the probation and parole officer, violated the conditions of probation. Such written statement delivered with the probationer by the arresting officer to the official in charge of a county jail or other place of detention shall be sufficient warrant for the detention of the probationer.
Miss.Code Ann. § 47-7-37 (Rev.2000). Accordingly, we find that this issue is wholly without merit.

VIII. Howell's Statement

¶ 99. As a continuation of issue VII, Howell contends that the statement he gave to the police on May 15, 2000, at approximately 9:30 p.m. should have been suppressed. The record reflects that Howell was read a waiver-of-rights form at 9:29 p.m., and he signed the waiver at 9:31 p.m. Howell argues that since his arrest was illegal, because Officer Nance signed the "blue warrant," the statement should have been suppressed. Finding that the arrest was proper, the trial court denied Howell's motion to suppress.

¶ 100. As issue VII concluded that Howell's arrest was in fact valid, this issue is without merit. Therefore, we find that the trial court did not err in denying Howell's motion to suppress his

statement given to the police.

IX. Howell's Statements Made to Other Witnesses

¶ 101. Howell alleges that the trial court erred by allowing co-defendant, Lipsey, and witnesses, Shaw and Powell, to testify that he stated that he needed money to pay his probation officer. Howell contends that the statements attributed to Howell constituted hearsay and that the probative value of admitting the statement does not outweigh the prejudicial effect to his case. Howell claims that the State was allowed to bring his prior convictions in through the backdoor through the testimony of Lipsey, Shaw and Powell since Howell did not testify.

¶ 102. The State offered witness testimony regarding statements attributed to Howell in order to demonstrate a possible motive for Pernell's murder. M.R.E. 404(b) provides in part:
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive ...
The State contends that Howell's motive for killing Pernell was to obtain money to pay his probation officer in order to remain out of jail.

¶ 103. This Court has consistently allowed the admission of other crimes to prove intent. *See Hill v. State,* 797 So.2d 914, 917 (Miss.2001) (where this Court found that evidence of defendant's arrest was properly introduced to establish a possible motive for murder); ***733** *Sumrall v. State,* 758 So.2d 1091, 1095 (Miss.App. 2000) ; *Burns v. State,* 729 So.2d 203, 222 (Miss.1998) ; *Warren v. State,* 709 So.2d 415 (Miss.1998) ; *Hunt v. State,* 538 So.2d 422 (Miss.1989) ; *Jenkins v. State,* 507 So.2d 89 (Miss.1987) ; *Duplantis v. State,* 644 So.2d 1235 (Miss.1994) ; *Smith v. State,* 499 So.2d 750 (Miss.1986) ; *Ballenger v. State,* 667 So.2d at 1242; *Conner v. State,* 632 So.2d 1239, 1273-74 (Miss.1993) (where this Court found that evidence relating to cocaine use was used to establish motive for crime rather than to show bad character).

¶ 104. The State further cites *Burns v. State,* 729 So.2d 203, 220-22 (Miss.1998) , in support of its position. In *Burns,* the defendant argued that the trial court erred by allowing a witness to refer to the defendant's own statements about a prior crime. The witness testified that Burns had committed the murder because he "did not want to go back to the pen." *Id.* at 220. Pursuant to M.R.E. 404(b) , this Court concluded that the testimony was "admissible to show motive-that Burns killed [the victim] so that he could not be identified and be sent back to the penitentiary...." *Id.* at 221-22.

¶ 105. However, relevant evidence may still be excluded. In *Foster v. State,* 508 So.2d 1111, 1117 (Miss.1987) , this Court held:
Relevant evidence may still be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Miss. R.Evid. 403 . Thus, a trial court presented with Rule 403 objection to relevant evidence must engage in a balancing process. The more probative the evidence is, the less likely it is that a 403 factor will be of sufficient consequence to substantially outweigh the probative value ...
To tip the scale is not enough. The 403 factors must, in the language of the rule, "substantially outweigh" probative value before the evidence may be excluded. The trial court is afforded broad discretion in weighing these interests. *United States v. Chalan,* 812 F.2d 1302 (10th Cir.1987) ; *Brumley Estate v. Iowa Beef Processors, Inc.,* 704 F.2d 1351 (5th Cir.1983) , cert. denied, 465 U.S. 1028, 104 S.Ct. 1288, 79 L.Ed.2d 690 (1984) .

[33] ¶ 106. We find that the trial court did not abuse its discretion in allowing the testimony. The record clearly reflects that any prejudice from admitting the testimony does not substantially outweigh the probative value of allowing the testimony to establish Howell's motive and intent.

¶ 107. Finally, Howell argues that the trial court should have provided a limiting instruction informing the jury as to witness credibility. The record reflects that the State offered a limiting instruction, jury instruction S-9, which was given by the trial court. Jury instruction S-9 provided:
The Court instructs you that any evidence you may have heard regarding a witnesses' or the defendant's character or bad acts may not be considered by you to prove the character of the defendant in order to show that he acted in conformity therewith on the occasion alleged in the indictment. You may consider this evidence only for the purpose of proof of motive, intent, knowledge, absence or mistake or accident.
See McGilberry v. State, 741 So.2d at 913 ("juries are presumed to follow the instructions given to them by the court"). *See also Johnson v. State,* 475 So.2d 1136, 1142 (Miss.1985) (juries are to follow instructions "To presume otherwise would render the jury system inoperable."). For all the ***734** foregoing reasons, we find that this assignment of error is without merit.

X. Testimony by Shaw Regarding Statement made by Ray

¶ 108. Howell contends that the trial court erred in allowing Shaw to testify that Ray told him, "Marlon [Howell] had shot somebody." The record reflects that Ray, Howell, and Lipsey fled to Shaw's house, immediately following the shooting. Shaw's testimony on the State's direct examination was as follows:
State: When did you know--what made you know that Adam [Ray], Curtis [Lipsey] and Marlon Howell had returned to your house?
Shaw: Because I heard a loud noise. Somebody bumping like somebody was running through the house or whatever.
State: They were running through the house?
Shaw: Um-huh.
State: What did you do then?
Shaw: My girlfriend got up she was fussing. She asked me what was going on and that is when Adam [Ray] came knocking on the door and I got up and went to the door.
State: Did you get out of the bed and go when you say to the door or your bed room [sic] door?
Shaw: My bed room [sic] door.
State: What happened when you went to the bed room [sic] door?
Shaw: Adam [Ray], he was all hysterical and everything. He said that Marlon [Howell] had shot somebody.
Defense: Your Honor, we object to the statement.
The Court: Sustained.
State: Where was Marlon Howell at when Adam Ray came to your door?
Shaw: Standing in the front living room.
State: In the front room?
Shaw: Yes, sir.
State: In what tone of voice was Adam Ray talking?
Shaw: Like he was scared.
State: Was Marlon Howell positioned so that he could hear what Adam was saying?
Shaw: Yes, yes, sir.
State: Did Adam [Ray], did Marlon Howell hear what Adam Ray had to say?

Shaw: Yes, sir.
Defense: Your Honor, we again object to that.
The Court: It's overruled. He can answer go ahead.
State: When Adam Ray came to your door what did Adam Ray say?
Defense: Your Honor, we again object to that.
The Court: It's overruled. He can answer go ahead.
State: When Adam Ray came to your door what did Adam Ray say?
Shaw: He said Marlon had shot somebody.
State: What did you do at that time?
Shaw: I ran out of the room and I asked I thought they were playing. I said no he didn't. I said are y'all for real. He said yes, he is for real?
State: Who said yes he is for real?
Shaw: Curt [Lipsey].
State: Was Marlon Howell present when Curt [Lipsey] said that?
Shaw: Yes, sir.
State: What else if anything did Curt [Lipsey] say about the situation?
Shaw: He didn't really say too much of nothing. They all look like he this real scared and Marlon [Howell] he ***735** was standing right there in the front room with us too.
State: What else did Adam [Ray] have to say?
Shaw: He didn't really say nothing just looking scared.
State: Did Marlon Howell say anything?
Shaw: He told me he said I need to get to Blue Mountain. He said I need you to take me to Blue Mountain right now.
State: Wanted you to carry him to Blue Mountain right now. Where was Marlon standing at when he was saying that?
Shaw: In the front room with all of us.
State: Was he doing anything at the time?
Shaw: He had a green shirt wrapped like around his hand pulled up under his arm like this right here.
State: So he was standing in your living room with the shirt wrapped around his hand under his arm like this?
Shaw: Yes, sir.
State: What did you do?
Shaw: I was trying to figure how I was going to get him to Blue Mountain. I really didn't want to take him. I didn't want him to endanger me or my family or anyone that was in the house.
State: Were you scared at that time?
Shaw: Yes, sir....
State: What did you do then?
Shaw: He then jumped in the car with his and we headed off and rushed to Blue Mountain.
State: What now?
Shaw: He then jumped in the car with us and we rushed off to Blue Mountain.
State: Where did you go in Blue Mountain first?
Shaw: We took Marlon [Howell] home.
State: Marlon [Howell] say anything on the way to Blue Mountain or when he got there?
Shaw: Nobody was saying anything. I was just trying to hurry up and get him down there.
State: Once you got to Blue Mountain did anybody say anything then?
Shaw: He said don't tell nobody. Y'all don't need to tell nobody.
State: When you say he said don't tell nobody. You don't need to tell anybody, who said that?
Shaw: Marlon [Howell].

¶ 109. We find that Shaw's testimony did not constitute hearsay pursuant to M.R.E. 801(d)(2)(B) which provides:
(d) Statements Which Are Not Hearsay. A statement is not hearsay if:
(2) Admission by Party-Opponent. The statement is offered against a party and is ... (B) a statement of which he has manifested his adoption or belief in its truth ...
In *Manning v. State,* 726 So.2d 1152, 1180 (Miss.1998) , this Court basically defined "the common law version" of M.R.E. 801(d)(2)(B) finding that:
[S]tatements made by a third person, which tend to incriminate an accused, are admissible so long as they are made in the presence of the accused and are not contradicted, denied, nor objected to by the accused.
Manning, 726 So.2d at 1180 (quoting *Jolly v. State,* 269 So.2d 650, 656 (Miss.1972)). *See also Jones v. State,* 367 So.2d 458 (Miss.1979) (affirming "adoptive admission" where bystander said, "he's the one that done the shooting" and the accused replied, "Yeah, and I'll get you as soon as I get out of this mess").

***736** ¶ 110. In the case sub judice, Ray's statement was made in Howell's presence. Howell did not contradict, deny or object to the statement Ray made to Shaw. Shaw's testimony provided that Howell was present when the statement was made and did not dispute the statement. In fact, Howell then requested that Shaw drive him home "right now" and told Shaw that "y'all don't need to tell nobody [sic]." Shaw testified that he was afraid of Howell. Shaw testified that he feared for his safety and the safety of his family if he did not comply with Howell's request.

[34] ¶ 111. We find that the record reflects that the trial court did not err in allowing Shaw to testify about Ray's statement. The statement clearly amounts to an "adoptive admission" pursuant to M.R.E. 801(d)(2)(B) . *See Manning,* 726 So.2d at 1180 .

¶ 112. In the case sub judice, the State presented testimony from Rice, who positively identified Howell as the shooter and the testimony of Lipsey, co- defendant, who identified Howell as the person who shot Pernell. We find that this assignment of error is meritless.

XI. Re-Cross Examination

[35] ¶ 113. Howell contends that the trial court erred by refusing to allow re-cross examination to be conducted by the defense. Howell argues that the trial court's ruling "left the jury with the impression Shaw had no pending criminal charges when he gave his statement to the District Attorney's office." We find that the record reflects that Howell's assertion is meritless. The following exchange occurred on the record:

Cross Examination by the Defense:
Defense: Mr. Shaw, have you been promised anything to testify?
Shaw: No, sir.
Defense: Have you been given any leniency on any criminal matters?
Shaw: No, sir.
Defense: You have not?
Shaw: No, sir.
Defense: Do you have pending criminal matters before the district attorney's office?
Shaw: I have some charges, against me.
Defense: Those are charges that existed on the day you went down there and gave this statement to the police, isn't it?

Shaw: Yes, sir.
Defense: And you have not been prosecuted or brought to trial since have you?
Shaw: No, sir.
Defense: Court indulge me one second.
The Court: All right, sir.
Defense: We tender the witness.
The Court: Any redirect, Mr. Luther.

Re-Direct Examination by the State:
State: I will try to cover this as it came along probably working backwards. You were asked about criminal charges pending against you. What were you charged with doing?
Shaw: Grand larceny.
State: What was that of?
Shaw: That was some stuff consisted on the rail road.
State: Steel on the rail road?
Shaw: Yes, sir.
State: So you are charged with taking some steel off the rail road tracks?
Shaw: Yes, sir.
State: When was that charge brought?
Shaw: About I was about 15 or 16 then.
State: You were 15 or 16?
Shaw: Yes, sir.
***737** State: I believe that was a '98 charge isn't it?
Shaw: Yes, sir.
State: '98. I believe you entered the pretrial diversion program; didn't you?
Shaw: Yes, sir.
State: Where and when did you enter the program?
Shaw: I think I was about 18 then.
State: So I believe that program consisted of if you did not get in any more trouble you wouldn't have a felony record; is that right?
Shaw: Yes, sir....
State: Have you been promised anything for your testimony today?
Shaw: No, sir.
State: Has the police or district attorneys or anything else even discussed your prior charges with you?
Shaw: Prior charges towards what.
State: The incident about taking the steel off the rail road track?
Shaw: No, sir.
State: Is that any consideration of your testimony here today?
Shaw: No, sir.
Defense: Please the court, I need to ask him one question about the issue he brought up about why he is not being prosecuted.
The Court: You did not object to it as being improper.
Defense: I don't think it was improper, Your Honor, but he has left the impression that I think it needs to be cleared up.
The Court: I don't. It's overruled....

¶ 114. The trial court stated that for the record that Howell never objected to the State's line of re-direct questioning concerning Shaw's pending criminal charges as being improper. The trial court did

not conclude that the jury was left with a false impression of Shaw's criminal charges. Shaw testified that he had charges pending when he talked to the District Attorney's office. Shaw further testified that his criminal charges were not discussed and he received no promises or any leniency in exchange for his testimony.

¶ 115. In *Whitehurst v. State,* 540 So.2d 1319, 1325-26 (Miss.1989) , this Court stated:
Hubbard v. State, 437 So.2d 430, 434 (Miss.1983) , sets out rather clearly that "re-cross examination is not allowable as a matter of right, but a matter of trial court discretion." The defendant's argument that his valuable right of cross-examination was bridled, based on *Edge v. State,* 393 So.2d 1337 (Miss.1981) , and *Miskelley v. State,* 480 So.2d 1104 (Miss.1985) , avails him none. *Edge* dealt with surrebuttal testimony, and *Miskelley* dealt with cross examination. Thus, these cases are factually distinguishable.
Hubbard is authority for the proposition that it is proper to deny re-cross examination "where there is no claim of oversight and no reason stated why the matter was not inquired into on" cross examination. 437 So.2d at 434 .

¶ 116. Furthermore, this Court held in *Sullivan v. State,* 749 So.2d 983, 991 (Miss.1999) :
Mississippi has adopted the Corpus Juris Secundum standard for re-cross examination of witnesses: "It is proper to exclude questions as to matters which were not opened up or brought out on redirect examination, or as to matters already fully covered or discussed at length on cross-examination, where there is not claim of oversight and no reason stated why the matter was not inquired into on the cross-examination proper." ***738** *Hubbard v. State,* 437 So.2d 430, 434 (Miss.1983) (quoting 98 C.J.S. Witnesses § 429). In this case, Sullivan does not allege that he was deprived of his constitutional right to confront witnesses testifying against him. That right is protected by both constitutional and case law. *See Shaffer v. State,* 740 So.2d 273 (Miss.1998) (citing *Hamburg v. State, State,* 248 So.2d 430, 434 (Miss.1971)).

¶ 117. From a review of the record and this Court's precedent related to re- cross examination, we find that Howell's allegation that the trial court erred in declining to reopen cross-examination is without merit.

XII. Directed Verdict

¶ 118. Howell contends that the State presented insufficient evidence to prove the underlying felony of robbery and, therefore, the charge of capital murder. In *Knox v. State,* 805 So.2d 527, 530 (Miss.2002) , this Court stated:
When reviewing the sufficiency of the evidence, this Court looks to all of the evidence before the jurors to determine whether a reasonable, hypothetical juror could find, beyond a reasonable doubt, that the defendant is guilty. *Jackson v. State,* 614 So.2d 965, 972 (Miss.1993) . All of the evidence must be considered in the light most favorable to the verdict, and the credible evidence consistent with guilt must be accepted as true. *Gleeton v. State,* 716 So.2d 1083, 1087 (Miss.1998) (citing *Franklin v. State,* 676 So.2d 287, 288 (Miss.1996) ; *Wetz v. State,* 503 So.2d 803, 808 (Miss.1987)). "The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Id.*

¶ 119. Miss.Code Ann. § 97-3-19(2)(e) defines capital murder as:
(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
(e) When done with or without any design to effect death, by any person engaged in the commission

of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies.
Furthermore, Miss.Code Ann. § 97-3-73 (Rev.2000) defines robbery as:
Every person who shall feloniously take the personal property of another, in his presence or from his person and against his will, by violence to his person or by putting such person in fear of some immediate injury to his person, shall be guilty of robbery.

¶ 120. The evidence in the record indicates that when Howell got in the car with Shaw, Lipsey and Ray that night, Howell "explained to [them] that he needed some money to pay his probation officer." According to Lipsey, Howell "just got in the car and it was like he needed some money or else [they] weren't going to see him any more after that night, to pay his probation officer."

¶ 121. In addition, Powell testified that on that night Howell stated that he "needed to pay the probation officer." Howell told Powell "that he was going to have to pay his probation officer. They were going to lock him up." Howell said that "he needed to make a sting for some money...." That night while driving around Tupelo, Howell observed a man standing outside a closed service station and stated that "there go [sic] an easy lick right there."

¶ 122. Howell was identified as the shooter by both an independent witness, ***739** Rice, and by co-defendant, Lipsey. According to Lipsey, Howell reached inside Pernell's car, and there was some "scuffling or fighting." Howell "had his arm in the man[']s window doing something with him." This lasted about a half a minute. Then, Howell pulled away from the car and raised his hands in the air, jumped back and fired the gun shooting Pernell.

¶ 123. Lipsey stated that when Howell returned to the car, Howell stated that "the man sprayed him in the face with some mace so he shot him." Lipsey did not smell mace or see tears in Howell's eyes. The police found a large amount of change on the floorboard of the driver's side of the victim's car.

[36] [37] ¶ 124. A jury's finding of fact is not to be overturned when there is credible evidence in the record for which the jury could have reasonably inferred the offense or unless the verdict was clearly against the overwhelming weight of the evidence. *Bailey v. State,* 785 So.2d 1071, 1075 (Miss.App.2001) ; *Groseclose v. State,* 440 So.2d 297, 300 (Miss.1983) . There is no doubt that there is ample evidence in the record that a reasonable person could infer Howell's intent to rob Pernell.

¶ 125. It was within the jury's province to draw reasonable inferences from facts based on experience and common sense. *Lewis v. State,* 573 So.2d 719, 723 (Miss.1990) . Inferences for the motive of robbery have been accepted by this Court when they are reasonable. *See Swinney v. State,* 829 So.2d 1225, 1236 (Miss.2002) (it may be reasonably inferred that the robbery was interrupted, and the motive was robbery); *Duplantis v. State,* 708 So.2d 1327, 1342 (Miss.1998) (the jury apparently drew this inference from the facts, and we accept the jury's finding). The jury considered the facts and circumstances after listening to the witnesses then rendered its verdict. The verdict should not be disturbed. The evidence was sufficient to support the verdict. We find this assignment of error to be without merit.

XIII. Jury Instruction S-2

¶ 126. Continuing from issue XII, Howell next contends Miss.Code Ann. § 97-3-19 does not specifically enumerate attempted robbery as an underlying offense for the conviction of capital

murder. As such Howell argues that the underlying offense of attempted robbery violates his Eighth and Fourteenth Amendment rights. Specifically, Howell asserts that:
To allow the trial court to insert attempted robbery as an aggravating factor when it is not specifically set out by statute allows the Court to expand the aggravating circumstances enumerated by MCA § 97-3-19 . The aggravating circumstances perform the constitutional necessary function of providing a meaningful basis for distinguishing the few cases in which the death penalty is imposed from many cases in which it is not. *See Godfrey v. Georgia,* 446 U.S. 420, 427, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) .

¶ 127. Howell further states that "by allowing the use of attempted robbery, the trial court has extended the narrow parameters of the Mississippi capital murder statute Miss.Code Ann. § 97-3-19 ." Miss.Code Ann. § 97-3-19(2)(e) provides the list of underlying crimes that can elevate murder to a capital offense. Miss.Code Ann. § 97-3-19(2)(e) further includes "any attempt to commit such felonies" within the statutory provision. Miss.Code Ann. § 97- 3-19(2)(e) defines capital murder as follows:
The killing of a human being without the authority of law by any means or in any manner.... When done with or without any design to effect death, by any person ***740** engaged in the commission of the crime of rape, burglary, kidnapping, arson, **robbery,** sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, **or in any attempt to commit such felonies.**
Miss.Code Ann. § 97-3-19(2)(e) (emphasis added).

¶ 128. We find that Howell's argument is clearly not supported by the language of Miss.Code Ann. § 97-3-19(2)(e) . Furthermore, in *Willie v. State,* 585 So.2d 660, 674 (Miss.1991) , the defendant raised similar arguments as the case at hand:
Willie argues that his conviction must be reversed because (1) the jury returned a general verdict of guilty without specifying whether it found that Willie killed Joe Clardy while Willie robbed or attempted to rob Joe Clardy, and (2) the jury was instructed over Willie's objection that it could find Willie's objection that it could find Willie guilty of capital murder if it found that Willie killed Joe Clardy while engaged in the commission of attempted robbery.
We previously considered Willie's argument in *Culberson v. State,* 379 So.2d 499 (Miss.1979) , cert. denied, 449 U.S. 986, 101 S.Ct. 406, 66 L.Ed.2d 250 (1980) . In *Culberson,* we found that reference to subsection 2(e) of Miss.Code Ann. § 97-3-19 and the statutory language, "engaged in the commission of," was sufficient to put a defendant on notice that he could be charged with the commission or the attempt to commit the constituent felony of robbery. *Culberson,* 379 So.2d at 503-04. Finding nothing new in Willie's argument, we affirm our decision in *Culberson.*
Id. See also Harris v. State, 445 So.2d 1369, 1370-71 (Miss.1984) . In *Harris,* this Court held:
In Mississippi *both an attempt to take and an actual taking* of another's personal property against his will by violence to his person or by putting such person in fear of immediate injury to his person by exhibition of a deadly weapon constitutes robbery.
Id.

¶ 129. Howell contends the trial court erred in granting jury instruction S-2 which contained the language "attempt to take." Jury instruction S-2 provided:
THE COURT instructs the jury that if you find from the evidence in this case beyond a reasonable doubt that:
(1) The defendant, Marlon Latodd Howell, did, on or about the 15th day of May, 2000, unlawfully, willfully and feloniously, attempt to take the personal property of Hugh David Pernell; and,
(2) The defendant, Marlon Latodd Howell, attempted to take the personal property from the person of

Hugh David Pernell and against the will of the said Hugh David Pernell; and,
(3) The defendant, Marlin [sic] Latodd Howell, attempted to take the property by violence toward Hugh David Pernell by shooting the said Hugh David Pernell with a pistol; and,
(4) At the time, Marlon Latodd Howell had the intent to permanently deprive Hugh David Pernell of the property,
then you shall find that the defendant Marlon Latodd Howell, was engaged in the commission of the crime of robbery as contemplated by Jury Instruction Number S-1.
If the State of Mississippi has failed to prove any one or more of these elements beyond a reasonable doubt, then you shall find that the defendant, Marlon Latodd Howell, was not engaged in the commission of the crime of robbery as ***741** contemplated by Jury Instruction Number S-1.

¶ 130. As discussed, we find that Howell's assignment of error is without merit. Based on the language of Miss.Code Ann. § 97-3-19(2)(e) , we also find that the trial court did not err in granting jury instruction S-2.

XIV. Instructions D-13, D-18, S-3

¶ 131. Howell argues that the trial court erred by failing to grant jury instructions for simple murder and manslaughter. The trial court gave jury instruction S-6 as a form of the verdict jury instruction. Instruction S-6 provided:
The Court instructs the jury that all twelve (12) of you must agree on any verdict that is returned in this case.
The verdict of the jury should be written upon a separate sheet of clean paper, need not to be signed by you, and should be in one of the following forms, to-wit:
1) If you find from the evidence in this case, beyond a reasonable doubt, that the defendant, Marlon Latodd Howell, is guilty of capital murder upon Hugh David Pernell as charged under the indictment, then the form or your verdict should be:
"We, the jury, find the defendant, Marlon Latodd Howell, guilty of capital murder as charged under the indictment."
2) If you find the defendant, Marlon Latodd Howell, not guilty of capital murder, then the form of your verdict should be:
"We, the jury, find the defendant, Marlon Latodd Howell, not guilty of capital murder under the indictment."

¶ 132. The State withdrew its jury instruction S-3 on simple murder, citing a lack of evidence presented to support such an instruction. Instruction S-3 provided:
The Court instructs the jury that if the evidence warrants it, you may find the defendant, Marlon Latodd Howell, guilty of the lesser crime of "simple murder."
However, notwithstanding this right, it is your duty to accept the law as given to you by this Court, and, if the facts and the law warrant a conviction of the crime of "capital murder" as charged in the indictment, then it is your duty to make such finding uninfluenced by your power to find the defendant guilty of a lesser offense.
This provision is not designed to relieve you from the performance of an unpleasant duty. It is included to prevent a failure of justice if the evidence fails to prove the original charge but does justify a verdict for the lesser offense.

¶ 133. Howell's proposed instruction D 13 submitted both a simple murder and a manslaughter instruction. However, Howell requested to submit S 3 on simple murder, combined with his own instruction on manslaughter.

¶ 134. The State argued that the evidence did not support an instruction on either simple murder or manslaughter. Specifically, the State pointed out that an instruction for simple murder was not proper, as this was a premeditated murder which occurred during the course of a robbery. Furthermore, the State noted that an instruction for manslaughter was not proper in the light of the fact that Howell presented an alibi defense. Howell filed a notice of his alibi defense which stated that at the time of the offense he was at his home in New Albany, Mississippi, and listed James Howell and Miriam Howell as alibi witnesses.

¶ 135. Instruction D-13 provided:
***742** If you fail to find the defendant, Marlon Howell, guilty of capital murder, then you should continue your deliberations to consider the elements of the felony crime of simple murder. If you find from the evidence in this case beyond a reasonable doubt that Marlon Howell on or about May 15, 2000, in Union County, Mississippi, killed David Pernell, a human being in the commission of an act imminently dangerous to others and evidencing a depraved heart, regardless of human life, without authority of law, even though the defendant had no premeditated design to affect the death of any particular individual, then you should find the defendant, Marlon Howell, guilty of murder. If the State has failed to prove any one or more of these elements beyond a reasonable doubt, then you should find the defendant, Marlon Howell, not guilty of murder.
If you fail to find the defendant, Marlon Howell, guilty of simple murder, then you should continue your deliberations to consider the elements of the felony crime of manslaughter.
If you find from the evidence in this case beyond a reasonable doubt that:
1. Marlon Howell on or about May 15, 2000, in Union County, Mississippi;
2. Killed David Pernell;
3. By gunshot; and
4. Marlon Howell was negligent or act with wanton disregard for human life, and the negligence was so gross as to be tantamount to a wanton disregard of, or utter indifference to the safety of human life; and
5. Such negligence or wanton disregard, if any, directly caused the death of David Pernell, then you shall find the defendant guilty of manslaughter.
If the prosecution has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find the defendant not guilty.

¶ 136. The trial court refused jury instructions D-13 and S-3 after the following exchange transpired on the record:
Defense: Now 13 is the one that ... pertains to the simple murder and I think the State's S-3 that was previously submitted and withdrawn would be a better instruction on the simple murder. However, the last paragraph concerning the felony of manslaughter we would ask that that be joined with S-3 or if the court determines that manslaughter is not proper then we are submitting that simple murder is proper. I don't want a commingle with what manslaughter and the other and have them both effectively removed. I think it's a case by case situation.
State: We object to both request for a murder and manslaughter instruction. We object to a simple murder instruction and we object to a man slaughter instruction because neither of those instructions are supported by the evidence. We don't we couldn't prove simple murder if we wanted to. We don't have any. We don't have any intent. The murder to prove a simple premeditated murder. So, that is why I say that it's not a murder. This instruction is not supported by the facts of this case. They didn't know the victim so obviously he didn't have any other then to rob them and kill him other than the robbery motive. So therefore we are saying that there is not evidence of premeditation and deliberate design which is a necessary element to prove simple murder. Whereas the evidence is sufficient to

prove capital murder. And I believe the same thing would go for a manslaughter ***743** instruction if the instruction they have submitted is based upon negligence, gross culpable negligence manslaughter. We disagree that they should be entitled to that instruction because if you are committing the crime of armed robbery and regardless of whether it's negligence or whatever, whatever this case is whether it's with or with out deliberate design and you kill some one you are guilty of capital murder and not manslaughter.
Defense: Judge, I agree with him but the point that I think is going to be argued strongly by us is there is no proof of a robbery.
The Court: They are putting their burden on that.
Defense: But then they say well there is no proof of a robbery but we think he shot this man what is the jury going to do then.
State: Their defense is not that this man shot him. There defense is alibi.
Defense: We are entitled to bring up whatever defenses we want. Mr. Rice testified there was absolutely nothing to believe there was a robbery going on. This jury can find that this man was there and did shoot Mr. Rice. But that, I mean Mr. Pernell but based on Mr. Rice's testimony there was no robbery going on and therefore whatever for whatever reason he shot him it's manslaughter.
The Court: I'm going to refuse the instruction....

¶ 137. Howell also submitted jury instruction D-18, a simple murder instruction, which was also refused by the trial court. Instruction D-18 provided:
The Court instructs the jury that if you find the defendant, Marlon Latodd Howell, not guilty of "capital murder" as charged in the indictment, then you should continue your deliberation to determine whether the defendant, Marlon Latodd Howell, has committed the lesser crime of "simple murder."
The crime of "simple murder" is distinguished from the crime of "capital murder" by the absence of, or by the failure of the State to prove, the following element of the offense of "capital murder," to wit: the defendant, Marlon Latodd Howell, did kill the said Hugh David Pernell at a time when the said Marlon Latodd Howell was engaged in the commission of the crime of robbery of the said Hugh David Pernell.
THEREFORE, if you find from the evidence under this case beyond a reasonable doubt that:
1) Hugh David Pernell was a living human being; and
2) the defendant, Marlon Latodd Howell, did kill the said Hugh David Pernell in Union County, Mississippi, on or about the 15th day of May, 2000; and
3) the defendant, Marlon Latodd Howell, acted unlawfully, willfully, and feloniously, without authority of law, and with the deliberate design to effect the death if Hugh David Pernell, then you shall find the defendant, Marlon Latodd Howell, guilty of capital murder.
If you fail to find the defendant, Marlon Howell, guilty of simple murder, then you should continue your deliberations to consider the elements of the felony crime of manslaughter.
If you find from the evidence in this case beyond a reasonable doubt that:
1. Marlon Howell on or about May 15, 2000, in Union County, Mississippi;
2. Killed David Pernell;
***744** 3. By gunshot; and
4. Marlon Howell was negligent or acted with wanton disregard for human life, and the negligence was so gross as to be tantamount to a wanton disregard of, or utter indifference to the safety to human life; and
5. Such negligence or wanton disregard, if any, directly caused the death of David Pernell, then you shall find the defendant guilty of manslaughter.
If the prosecution has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find the defendant not guilty.

¶ 138. On appeal, Howell specifically argues that:
The jury could have found and returned the lesser-included offense of simple murder or manslaughter. The fact remains that if this jury had believed Howell approached P[illegible]nell's vehicle to sell him drugs and was sprayed in the face with mace by Pernell in reaction, then they could have returned a conviction on manslaughter. The [c][illegible]t's failure to instruct the jury on the lesser included offense of simple murder and manslaughter was error. The jury as instructed had no choice but either to turn Howell loose or convict him of [c]apital murder ...

[38] ¶ 139. However, we find that Howell's argument that the trial court erred by not granting instructions S-3, D-13 and D-18 as to both simple murder and manslaughter, is contradicted by the evidence in the record. The facts of this case clearly do not support or warrant such instructions. In *Presley v. State*, 321 So.2d 309, 310 (Miss.1975) , this Court said:
The method of submitting an instruction dealing with a lesser-included offense varies with each case. In some cases it may be sufficient simply to point out that the lesser offense is the same except for the absence of some specific element. In others it may be necessary to include all the essential elements of the included offense as was done for the principal charge. However, the jury should not be instructed as to a lesser-included offense in such a way as to ignore the primary charge as this would be confusing to the jury. It is also true that if the evidence does not justify submission of a lesser-included offense, the court should refuse to do so. Unwarranted submission of a lesser offense is an invitation to the jury to disregard the law.
See Grace v. State, 375 So.2d 419, 420 (Miss.1979) .

¶ 140. We find that this assignment of error is without merit.

XV. Instruction D-3, Weight of Evidence

¶ 141. Howell argues that the jury should have been instructed as to the weight and quality of the evidence. Specifically, Howell contends that the trial court erred in refusing his proposed jury instruction D-3, which provided:
Each person testifying under oath is a witness. You have the duty to determine the believability of the witnesses. In performing this duty, you must consider each witness' intelligence, the witness' ability to observe and accurately remember, the witness' sincerity, and the witness' demeanor while testifying. You must consider also the extent the witness is either supported or contradicted by other evidence; the relationship the witness may have with either side; and how the witness might be affected by the verdict. You must consider any evidence of the witness' character for truthfulness.
***745** In weighing a discrepancy by a witness or between witnesses, you should consider whether it resulted from an innocent mistake or a deliberate falsehood, and whether it pertains to a matter of importance or an unimportant detail.
You may reject or accept all or any part of a witness' testimony and you may reject part and accept other parts of a witnesses' [sic] testimony.
After making your own judgment, you will give the testimony of each witness the credibility, if any, as you may think it deserves.
The weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or nonexistence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

¶ 142. In *Humphrey v. State*, 759 So.2d 368, 380 (Miss.2000) , this Court stated:

Jury instructions are to be read together and taken as a whole with no one jury instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case, however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence. (citing *Heidel v. State,* 587 So.2d 835, 842 (Miss.1991)). *See also Austin v. State,* 784 So.2d 186, 193 (Miss.2001) .

[39] ¶ 143. Instructions that comment on the weight of the evidence are not proper. *Id.* at 193. Specifically, instructions that direct jurors' attention to the quality or weight of the evidence have been condemned by this Court. *See Hentz v. State,* 489 So.2d 1386, 1387 (Miss.1986) .

¶ 144. Through Instruction C-1, the trial court instructed these jurors were the sole judges of credibility in this case. Instruction C-1 further stated the jury had the exclusive province to determine what weight and credibility to assign the testimony and supporting evidence of each witness.

¶ 145. The jury was also instructed to view the evidence as a whole when determining whether reasonable doubt existed. Instruction D-2 further provided that:
The [c]ourt instructs the jury that you are bound in deliberating upon this case, to give the defendant the benefit of any reasonable doubt of the defendant's guilt that arises out of the evidence or want of evidence in this case. It is only when, after examining the evidence on the whole, you are able to say on your oaths, beyond a reasonable doubt, that the defendant is guilty that the law will permit you to find him guilty. You might be able to say that you believe him to be guilty, and yet, if you are not able to say on your oaths, beyond a reasonable doubt, that he is guilty, it is your sworn duty to find the defendant "Not Guilty."

¶ 146. Additionally, the jury was instructed to view the accomplice testimony with suspicion and distrust. Instruction D-5 provided as follows:
The [c]ourt instructs the jury that the law looks with suspicion and distrust on the testimony of an alleged accomplice and requires the jury to weigh the same with great care, caution, and suspicion. You should weigh the testimony from alleged accomplices, and passing on what weight, if any, you should give this testimony, you should weigh it with great care and caution, and look upon it with distrust and suspicion.

***746** ¶ 147. The jury was further instructed that they could disregard testimony contradicted by inconsistent evidence. Instruction D-7 provided as follows:
In determining the credibility of particular testimony, you should also consider the extent to which the testimony was impeached. A witness may be impeached by disproving the facts to which the witness testified; by proof of general bad character; and by proof of contradictory or inconsistent prior statement or statements made by the witness. To access [sic] the importance of inconsistency or contradictory testimony or statements you should determine:
1. If such testimony is given or if such statements were made;
2. Whether they are in fact in consistent [sic] with or contradictory to the witness' present testimony; and
3. Whether or not the testimony or statements are material to the witness' testimony in the case.
If you find that a witness has been impeached by proof of previous contradictory or inconsistent testimony or statements, you may disregard that testimony. You may also consider that impeachment as being relevant to your determination of the weight to be afforded the balance of the witness' testimony.

[40] [41] ¶ 148. "A trial judge is under no obligation to grant redundant instructions. The refusal to grant an instruction which is similar to one already given does not constitute reversible error." *Montana v. State,* 822 So.2d 954, 961 (Miss.2002) . "The refusal to grant an instruction which is similar to one already given does not constitute reversible error." *Id.* In *Bell v. State,* 725 So.2d 836 (Miss.1998) , this Court stated that:
The trial judge is under no obligation to grant redundant instructions. *Davis v. State,* 568 So.2d 277, 280-81 (Miss.1990) . Indeed, to do so can only create confusion and make it more difficult for the jury to understand the charge. When the instructions are read as a whole, as indeed they must be, we find no error in the refusal of these specific requested instructions.
Bell, 725 So.2d at 849-49 .

[42] ¶ 149. We find that the record reflects that Howell was given numerous jury instructions on their role in gauging witness credibility. The jury was given instructions D-2, D-5 and D-7 which advised them how to view the evidence as a whole, accomplice testimony and inconsistent statements or testimony. Howell's instruction D-3 was properly denied. This issue is without merit.

XVI. Instruction D-8, Testimony of Law Enforcement Officer

¶ 150. Howell contends that the trial court erred in denying proposed jury instruction, D-8, which provided:
The testimony of a law enforcement officer should be considered by you just as any other evidence in the case. In evaluating his or her credibility you should use the same guidelines which you apply to the testimony of any witness. In no event should you give greater or lesser credence to the testimony of any witness merely because he or she is a law enforcement officer.

¶ 151. This Court has soundly and repeatedly rejected this argument:
Austin argues that the trial court erred by refusing his request for "level playing field" jury instruction-that is, one that noted that the testimony of a police officer is not entitled to greater weight than any other witness. The requested instruction would have advised the jury that:
***747** The testimony of a law enforcement officer should be considered by you just as any other evidence in the case. In evaluating his or her credibility you should use the same guidelines which you apply to the testimony of any witness. In no event should you give either greater or less credence to the testimony of any witness merely because he or she is a law enforcement officer.
The trial court refused the instruction because it was duplicitous of another instruction that had already been granted.
This Court has previously held that the very same instruction offered by Austin was properly refused. *See Stewart v. State,* 355 So.2d 94, 96 (Miss.1978) ; *Washington v. State,* 341 So.2d 663, 664 (Miss.1977) . The Court recently reiterated its stance in *Hansen v. State,* 592 So.2d 114, 139 (Miss.1991) , noting that the trial court had given the jury the following general instruction:
As sole judges of the facts in this case, your exclusive province is to determine what weight and what credibility will be assigned the testimony and evidence of each witness in this case. You are required to use your common sense and sound honest judgment in considering and weighing the testimony of each witness who has testified in this case.
Id. at 140. This same instruction was granted in the case sub judice. *Hansen* further stated that:
Our law of criminal procedure has long perceived dangers in comments upon the evidence, and in that regard we have for years had a statute, Miss.Code Ann. § 99-17-35 (1972) , which reads in pertinent part: The judge in any criminal cause, shall not sum up or comment on the testimony, or charged the jury as to the weight of evidence.... It is certainly true that of late our attitude toward comments upon the evidence may have relaxed, *see Nichols v. Munn,* 565 So.2d 1132, 1136-37

(Miss.1990) ; *Weaver v. State,* 497 So.2d 1089, 1094 (Miss.1986) , but not so much that we will require the instruction at issue. We affirm on this issue.
Id. at 141.
Though Mississippi law is clear on this issue, Austin nonetheless argues that the refusal of the trial court to "level the playing field" resulted in a denial of his right to due process. Austin argues that courts routinely act contrary to the holdings in *Stewart* , *Washington* , and *Hansen* by granting cautionary instructions regarding informant testimony. It is true that where the State's case is based upon the testimony of an accomplice, corroborated only by a confidential informant, the trial court must grant a cautionary instruction. See *Edwards v. State,* 630 So.2d 343, 344 (Miss.1994) ; *Parker v. State,* 378 So.2d 662, 663 (Miss.1980) . The policy behind granting a cautionary informant instruction, however, is based on the fact that informant or accomplice testimony, by its very nature, is looked upon with suspicion and distrust. This rationale does not extend to police officer testimony. *Austin v. State,* 784 So.2d at 193 .

[43] ¶ 152. As discussed in issue XV, we find that the trial court properly instructed the jury on how to weigh the credibility of each and every witness. The trial judge did not abuse his discretion in refusing Howell's instruction D-8, distinguishing the testimony of law enforcement officers from that of any other witness. *See Austin,* 784 So.2d at 193. Accordingly, we find that Howell's assignment of error is without merit.

***748 XVII. Instruction D-16, Cross-Racial Eyewitness Identification**

[44] ¶ 153. Howell argues that the trial court erred in denying proposed instruction D-16 pertaining to eyewitness identification by a member of a different race. Instruction D-16 provided:
In this case the identifying witness is of a different race than the defendant. In the experience of many, it is more difficult to identify members of a different race than members of ones own. If this is also your own experience, you may consider it in evaluating the witness' testimony. You must also consider, of course, whether there are other factors present in this case which overcome any such difficulty of identification. For example, you may conclude that the witness has had sufficient contacts with members of a different race that he would not have greater difficulty in making a reliable identification.

¶ 154. Howell submits that this instruction has not been required under the laws of this State, stating that "this issue appears to be one of first impression." The defense contends that the special jury instruction should be required because Rice, a white man, identified Howell, a young black man. In support of his argument, Howell cites *State v. Cromedy,* 158 N.J. 112, 727 A.2d 457 (1999) , where the cross-racial identification in a rape case was not supported by any corroborating evidence. *Id.* The New Jersey Supreme Court held that:
"A cross-racial instruction should be given only when, as in the present case, identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability."
Id. at 467.

¶ 155. However, the court in *Cromedy* further provided that:
Courts typically have refused the instruction where the eyewitness or victim had an adequate opportunity to observe the defendant, there was corroborating evidence bolstering the identification, and/or there was no evidence that race affected the identification. *See Hyatt, supra,* 647 N.E.2d at 1171 (declining instruction in rape and robbery case where victim was terrorized for fifteen to twenty minutes in broad daylight and could see the attacker's face); *see also Commonwealth v. Engram,* 43

Mass.App.Ct. 804, 686 N.E.2d 1080 (1997) (declining instruction where numerous eyewitnesses saw defendant at close range and positively identified him from a line-up and photo array).
A number of courts have concluded that cross-racial identification simply is not an appropriate topic for jury instruction. *See State v. Willis,* 240 Kan. 580, 731 P.2d 287, 292-93 (1987) ; *Hyatt, supra,* 647 N.E.2d at 1171; *People v. McDaniel,* 217 A.D.2d 859, 630 N.Y.S.2d 112, 113, appeal denied, 87 N.Y.2d 848, 638 N.Y.S.2d 607, 661 N.E.2d 1389 (1995) . Those courts have determined that the cross-racial instruction requires expert guidance, and that cross-examination and summation are adequate safeguards to highlight unreliable identifications.
Other jurisdictions have denied the instruction, finding that the results of empirical studies on cross-racial identification are questionable. *See Telfaire, supra,* 469 F.2d at 561-62 (Leventhal, J., concurring) (rejecting cross-racial instruction because data supporting hypothesis is "meager"); *People v. Bias,* 131 Ill.App.3d 98, 86 Ill.Dec. 256, 475 N.E.2d 253, 257 (1985) (rejecting instruction in robbery case where eyewitness failed to describe key distinguishing ***749** facial features and gave inconsistent descriptions because empirical studies are not unanimous). One jurisdiction has even rejected cross-racial identification instructions as improper commentary on "the nature and quality" of the evidence. *See State v. Hadrick,* 523 A.2d 441, 444 (R.I.1987) (rejecting such instruction in robbery case where victim viewed perpetrator for two to three minutes at close range during robbery and identified him from a line-up).
Cromedy, 727 A.2d at 464-65 .

¶ 156. As discussed at length in the previously addressed issues, Rice's eyewitness identification was not the sole evidence against Howell presented to the jury. The facts clearly demonstrate that corroborating evidence was submitted to the jury, including the testimony of co-defendant, Lipsey, as well as, witnesses, Shaw and Powell. Therefore, we find that *Cromedy* is distinguishable from the facts at hand.

¶ 157. Furthermore, instruction S-8 given by the trial court instructed the jury about eyewitness testimony.
The [c]ourt instructs the [j]ury that in reaching your verdict you are to consider all of the evidence concerning the entire case and the circumstances surrounding the crime. One of the issues in this case is the identification of Marlon Latodd Howell is [sic] as the perpetrator of the crime. As with each element of the crime charged, the State has the burden of proving identity beyond a reasonable doubt, and before you may convict Marlon Latodd Howell you must be satisfied beyond a reasonable doubt of the accuracy of the identification of Marlon Latodd Howell. If, after considering all of the evidence concerning the crime and the witness's identification of Marlon Latodd Howell is [sic] as the person who committed the crime, you are not convinced beyond a reasonable doubt that he is the person who committed the crime, then you must find him not guilty.
Identification testimony is an expression of belief or impression by the witness. You must judge its value and reliability from the totality of the circumstances surrounding the crime and the subsequent identification. In appraising the identification testimony of a witness, you should consider the following:
1) Did the witness have an adequate opportunity to observe the offender?
2) Did the witness observe the offender with an adequate degree of attention?
3) Did the witness provide an accurate description of the offender after the crime?
4) How certain is the witness of the identification?
5) How much time passed between the crime and the identification?
If, after examining all of the testimony and the evidence, you have a reasonable doubt that Marlon Latodd Howell was the person who committed the crime, then you must find Marlon Latodd Howell is not guilty.

¶ 158. We find that instruction D-16 was properly denied by the trial court. As discussed previously, the trial court properly instructed the jury how to weigh the credibility of each witness that testified. This issue is without merit.

XVIII. Motion for Mistrial

¶ 159. Howell contends that the trial court erred by refusing to grant his motion for mistrial and renewed motion for change of venue.

***750** [45] [46] ¶ 160. "Whether to grant a motion for mistrial is within the sound discretion of the trial court. The standard of review for denial of a motion for mistrial is abuse of discretion." *Pulphus v. State,* 782 So.2d 1220, 1222 (Miss.2001) (citations omitted); *Spann v. State,* 771 So.2d 883, 889 (Miss.2000) ; *Johnson v. State,* 666 So.2d 784, 794 (Miss.1995) ; *Hoops v. State,* 681 So.2d at 521. "The failure of the court to grant a motion for mistrial will not be overturned on appeal unless the trial court abused its discretion." *Bass v. State,* 597 So.2d 182, 191 (Miss.1992) .

¶ 161. Howell alleges that a juror's father sat on the front row of the audience with the Pernell family. The record reflects that Howell waited until the next day to bring the matter to the trial court's attention. Howell made his motion to the trial court after the trial court had ruled on the jury instructions but before the jury was brought back in to receive the instructions.

¶ 162. The record provides:
Defense: Please the court I do have a matter for the record to bring up. Your Honor, yesterday at the conclusion of the defendants case we were advised that juror Michael Reed's father at the close of our case was seated on the front row with the Pernell family and we contend that that would be highly prejudicial to us. His son is sitting on the front row on the jury panel seeing his father with the victim's family. In light of that we ask the court for a mistrial. We think it is further evidence of the proof of the passion and prejudice in this community concerning this case and the inability of this defendant to get a fair trial here. We also, Your Honor, in light of that ask the court to declare a mistrial and to grant a change of venue in support of that I would like to mark a remark for the record news paper articles from the New Albany Gazette. March 30. And the Tupelo Daily Journal dated March 30 as well as a videotape and a transcript of the TV 9 broad cast concerning this particular case. We think these articles and new cast are evidence of the high profile nature of this case and the need for a change of venue.
The Court: Your motion for mistrial will be denied. Motion for change of venue will be denied and the court will address this issue.
Howell did not call any witnesses in support of his motion for mistrial.

¶ 163. The trial judge called the jury in and read the instructions to the jury. The defense and the State made their closing arguments to the jury. Following closing arguments, the State attempted to respond to Howell's allegations. The State offered to submit the testimony of a bailiff who knew the man in question. The State informed the trial court that the bailiff would testify that the man had not sat with the victim's family as alleged by the defense. In response, the trial court stated that "[t]he court hasn't heard any testimony from anybody, so, I don't think we need to do anything." The record reflects that following this exchange, Howell never objected nor requested that the trial court admonish the jury.

[47] ¶ 164. We find the trial court did not abuse its discretion in denying Howell's motion for

mistrial. Howell did not submit any proof to support his allegation. Furthermore, Howell did not present any evidence that the jury did not follow the trial court's instructions in rendering its verdict or that he was prejudiced in any way. We also find this issue to be without merit.

***751 XIX. Prosecutorial Comments in Closing Argument**

[48] ¶ 165. Howell contends that the trial court erred by allowing the State to comment on Howell's failure to testify. During the closing argument of the guilt phase of the trial, the prosecutor stated that "If you had an alibi and were accused of capital murder, don't you think you would tell somebody about it. Don't you think you would have given some details. Done something. That is common sense." According to Howell, the prosecutor's statement was a comment on his failure to take the stand. In support of his argument, Howell relies upon the following three cases: *Butler v. State,* 608 So.2d 314, 318 (Miss.1992) (prosecutor's comment that she "hasn't told you the whole truth yet" and "she has not yet told you the whole truth of the torment she subjected her son to. You still don't know the whole story.", amounted to commenting on the defendant's failure to testify, where the defendant was the only witness to her son's death); *West v. State,* 485 So.2d 681, 688 (Miss.1985) (prosecutor's comments that defense counsel stated that, " 'We decided not to put the [d]efendant on the stand for trial strategy.' Could any of you possibly have a doubt?" and other similar comments amounted to a comment on the defendant's failure to take the stand); and *Randall v. State,* 806 So.2d 185, 211-12 (Miss.2002) (prosecutorial comments "approached the edge of reversible error" when the prosecution commented on the failure of 24 witnesses for the defense to testify after Randall's objection to the State's improper comment regarding the absence of one witness).

¶ 166. The prosecutor's comments in the case sub judice are clearly distinguishable from the line of case law authority cited by Howell. In *Butler,* the prosecutor commented that the defendant was not telling the whole truth. *Butler,* 608 So.2d at 318. Unlike *Butler,* the case at hand had two witnesses testify that Howell shot Pernell. In *Butler,* the defendant was the only witness to her child's death.

¶ 167. In *West,* the prosecutor commented that the defendant did not take the stand for trial strategy purpose but there was "no doubt" as to guilt. *West,* 485 So.2d at 688. Again, the prosecutor in the case sub judice did not go to that extreme and speak about a lack of taking the stand. Instead, the prosecution brought out discrepancies in witnesses' testimony concerning Howell's alleged alibi defense. The prosecutor commented that common sense would dictate that a defendant would reveal the identity of an alibi when faced with capital murder charges.

¶ 168. In *Randall,* this Court found that prosecutorial misconduct was on the edge of reversible error for comments concerning the number of defense witnesses that did not testify at trial. This Court ultimately reversed the case in *Randall,* but not on that one issue standing alone. Clearly, no comments of this nature were made by the prosecution at Howell's trial.

[49] [50] [51] [52] [53] ¶ 169. Attorneys are allowed wide latitude in closing arguments. *Holly v. State,* 716 So.2d 979, 988 (Miss.1998) . The trial judge is in the best a position to determine if an alleged objectionable remark has a prejudicial effect. *Roundtree v. State,* 568 So.2d 1173, 1177 (Miss.1990) . "The judge is provided considerable discretion to determine whether the remark is so prejudicial that a mistrial should be declared." *Id.* at 1178. This Court has held:
There is a difference, however, between a comment on the defendant's failure to testify and a comment on the failure to put on a successful defense. Moreover, the State is entitled to comment on the lack of any defense, and such comment ***752** will not be construed as a reference to a defendant's failure to testify 'by innuendo and insinuation.'

Strahan v. State, 729 So.2d 800, 806 (Miss.1998) (citations omitted). An alleged improper prosecutorial comment during closing argument must be considered by the appellate court in context in which the statement was made. *Ballenger v. State*, 667 So.2d at 1270. When faced with this type of challenge, the appellate court must determine "whether the comment of the prosecutor can reasonably be construed as a comment upon the failure of [the accused] to take the stand." *Fears v. State*, 779 So.2d 1125, 1129 (Miss.2001) (quoting *Ladner v. State*, 584 So.2d 743, 754 (Miss.1991)). The appellate court reviews each comment on a case by case a basis. *Id.* at 1129-30. Taking the comment in context during the sentencing phase of the trial on rebuttal, the prosecution stated the following:
The defendant's own father. I guess is part of the defense team. He also wanted to attack the chief who went to school with him. You know the lethal piece of evidence in this whole case is the big chief's mouth to think he was stupid enough and the law enforcement officers were stupid enough to believe that he is in Corinth with a whore. Think the cops are just going to go away. That you are going to forget about it. That is how simple minded the defendant is. That is [the] most lethal piece of evidence in this case that I see. Why would you lie. What is the reason. Common sense could make that decision. Why would he lie. Then I suppose that the father would have you believe that the reason the first time he is told anything about this alibi is that of the police are bad. No. I wouldn't tell them. What about the F B I? What about me? What about Judge Coleman. What about somebody instead of the first time any law enforcement is told allegedly that the defendant was there at that house when this crime occurred, when he sat don up here, Does that make common sense, I don't think so. Wouldn't you talk about, you know, with your daughter whether or not what time was it do you remember, did you hear him knock, Remember she head the bell ring, he head the knock, A lot of discrepancies there. Between their testimony, She said they never discussed that. Remember that. Nailed her down on that issue, Never wavered from it. Daddy said they did. Said they discussed and prayed about it and talked about it. But the best he could come up. He never came up with any time just the time he dropped him off at 8:25 a time that he wanted to know about. **If you had an alibi and were accused of capital murder, don't you think you would tell somebody about it. Don't you think you would give some details. Done something. That is common sense.**
(emphasis added).

¶ 170. When questioned by Chief Grisham, Howell told the officers that he was in Corinth with a woman at the time Pernell was shot. Howell told Chief Grisham that he did not know the woman's name or address, even after the police stressed the importance of verifying his alibi. Mississippi Highway Patrol investigator Mickey Baker also testified that Howell did not provide the woman's name or address. Howell continued to withhold the woman's information when the police told him that they had information of his involvement in the murder. Howell maintained that he was with a woman in Corinth.

¶ 171. Rev. Howell testified that the door bell rang and he went to the door. He heard his son's voice say, "It is me daddy." Rev. Howell then turned the ***753** latch on the door to his home and went back to bed. Rev. Howell never saw Howell. Marion Howell (Marion), Howell's sister, stated that she heard her father get up. She then looked at her pager which had a time of 3:00 a.m. She did not see Howell that night. Despite this testimony at trial, Howell never once mentioned that he had been at his father's home that night. Rev. Howell and Marion never told the police about any of these events either. In fact, Rev. Howell stated that he went to the police station and inquired about the arrest and charges against his son, but he never told the police that his son was allegedly at home that night.

¶ 172. In the case sub judice, the prosecutor was summarizing the testimony of the witnesses. He pointed out the conflicts in the alibi testimony of Howell's father and sister. [FN6] In effect, the comments concerned the lack of a successful alibi defense. This Court in *Strahan v. State*, 729 So.2d

at 806, held that the prosecution "is entitled to comment on the lack of any defense, and such comment will not be construed as a reference to a defendant's failure to testify 'by innuendo and insinuation.' " We find that this issue is without merit.

FN6. During closing argument, the defense commented on Rev. Howell and Marion's testimony. The prosecutor merely rebutted and commented on the defense's closing argument. The defense spoke at great length that neither witness lied to the jury but only stated the facts as they knew them.

XX. Cooling off Period

¶ 173. Howell argues that the trial court erred by failing to grant his motion for a 24 hour cooling off period between the end of the guilt phase and the beginning of the sentencing phase. He claims that the trial court did not make a finding of fact in denying the motion.

¶ 174. Miss.Code Ann. § 99-19-101(1) (Rev.2000) states the following in part:
Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death, life imprisonment without eligibility for parole, or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury **as soon as practicable.**
(emphasis added). Howell cites *McGilberry v. State*, 741 So.2d 894, 919 (Miss.1999) , for authority for his position. In *McGilberry*, this Court held the trial court did not abuse its discretion by denying a motion for a 12 hour cooling off period. *Id.* The trial court denied the motion noting that the jury had eaten lunch, it was the middle of the day, and there was no reason to grant a cooling off period. *Id.* Consequently, the defense had a 15 minute recess between the jury verdict and the sentencing phase of the trial. *Id.*

[54] ¶ 175. Trial judges normally have broad discretion in their decision on the time to begin a trial and the length of the proceedings each day. *Hooker v. State*, 716 So.2d 1104, 1112 (Miss.1998) . *See also Conley v. State*, 790 So.2d 773, 798 (Miss.2001) (upheld the denial of a 12 hour cooling off period where there had been a 30 minute recess between the guilt and sentencing phase of a capital murder).

¶ 176. After a short recess of approximately 15 minutes, defense counsel renewed its motion to the trial court for a 24 hour cooling off period between the guilt and sentencing phase. Counsel presented no argument to support of the cooling off period. The trial court denied the motion.

¶ 177. Even in his brief, Howell offers no valid reason to grant the motion. ***754** Miss.Code Ann. § 99-19-101(1) requires that a separate sentencing proceeding shall be conducted as soon as practicable. The trial court has discretion in determining the length of proceedings each day. *Hooker v. v. State*, 716 So.2d at 1112. Further, Mississippi has not adopted a statutorily mandated cooling off period between the guilt and sentencing phase of trial. *See Conley v. State*, 790 So.2d at 798 .

[55] ¶ 178. We find that the trial court's denial of the motion was not an abuse of discretion. Howell never showed why the motion for a cooling off period was necessary nor how the denial of the motion was improper or an abuse of discretion. The applicable statute requires a separate sentencing proceeding to be conducted as soon as practicable. Miss.Code Ann. § 99-19- 101(1) . This Court has upheld a 15 minute recess. *See McGilberry*, 741 So.2d at 919. The trial court in its discretion determined that the sentencing phase could begin the same day that the verdict was returned by the jury. This issue is without merit.

XXI. Prior Conviction as an Aggravating Factor

¶ 179. Howell argues that the use of the aggravating factor "under sentence of imprisonment" amounts to reversible error. In *Grayson v. State,* 806 So.2d at 252, this Court held that "[t]he legislature's intent was to protect the citizenry from the evil of the lesser felony by imposing a greater penalty upon a homicide occurring during its commission." *Id.* at 252. Miss.Code Ann. § 99-19-101 (5)(a) provides in pertinent part:
(5) Aggravating circumstances shall be limited to the following:
(a) The capital offense was committed by a person under sentence of imprisonment
Howell contends that the legislative intent of this language "under sentencing of imprisonment" in Miss.Code Ann. § 99-19-101(5)(a) was to deter *inmates* from committing murder while in *custody.* He claims that the fact that a felon is on probation or even off probation for a non-violent crime should not be considered as an aggravating factor in whether to impose the death penalty.

¶ 180. On numerous occasions, this Court has held that the aggravating circumstances language "under sentencing of imprisonment" applies to unincarcerated felons. In *Evans v. State,* 422 So.2d 737, 741 (Miss.1982) , this Court held that "under Mississippi statutes and decisions, when a person has been convicted and placed on probation, particularly here, where four (4) years of a five-year sentence were suspended, such sentence is a sentence under imprisonment."

¶ 181. In *Brown v. State,* 798 So.2d 481, 492 (Miss.2001) this Court held that "[i]t has been held that one who is under a suspended sentence is 'under sentence of imprisonment' for purposes of finding the aggravating circumstance listed at Miss.Code Ann. § 99-19-101(5)(a) ." Brown was convicted of aggravated assault, sentenced to a ten year term in prison, the sentence was suspended and he was placed on probation. *Id.* Later, one year of the sentence was revoked, however, the rest of the sentence was not revoked. *Id. See also Cole v. State,* 666 So.2d at 777 (serving a suspended sentence pursuant to a grand larceny conviction at the time the murder was committed was considered a sentence of imprisonment); *Lockett v. State,* 517 So.2d at 1336-37 (probated sentence meets the "under sentence of imprisonment" terms for purposes of finding the aggravating circumstance pursuant to Miss.Code Ann. § 99-19-101(5)(a)).

***755** ¶ 182. In the case sub judice, Officer Nance testified at the sentencing phase concerning Howell's prior sentence for possession of a controlled substance, a non-violent crime. He stated that a person on house arrest, a.k.a. intensive supervision program, is considered an inmate of the State. Howell was sentenced on March 3, 1999, to the intensive supervision program for three years. The first year of the sentence was to be served on house arrest and upon completion, Howell would then be placed on post-release supervision for two years. According to Officer Nance, the intensive supervision program is in lieu of transporting a defendant to the State penitentiary at Parchman. If a defendant violates the conditions and terms of the program, then the person is taken directly to Parchman. On February 11, 2000, Howell was transferred from the intense supervised program to post- release supervision in Tippah County. Pernell was shot on May 15, 2000.

[56] ¶ 183. Our precedents clearly permit the aggravating factor "under sentence of imprisonment" pursuant to § 99-19-101(5)(a) to include probated, paroled, and suspended sentences. Accordingly, we find that this issue is without merit.

XXII. Pecuniary Gain

¶ 184. Howell next argues that the trial court erred by allowing Officer Nance to testify to the fee payment schedule for probationers. He complains that the prosecution used the same pecuniary gain or motive at trial and during the sentencing phase to provide an aggravating factor for the jury.

[57] [58] ¶ 185. The State argues that Howell is procedurally barred from raising this issue as he failed to raise this objection at the sentencing hearing. We agree. The following exchange between the State and Officer Nance indicates that the defense objected on the grounds of the imprisonment issue pursuant to Miss.Code Ann. § 99-19-101(5)(a) :
Defense: This is a conviction, Judge the record I would want to object to this being used as an aggravating circumstance because it's not a conviction involving violence or the propensity for violence. We contend that he was under a sentence where he was on probation and not under a sentence of imprisonment and that is a distinction and that this conviction could not be used as an aggravating factor.
The Court: All right. All right, Mr. Hood.
State: Your Honor, first of all the State would move to reintroduce for the juries consideration all the evidence introduced and presented to the jury for oral testimony for their consideration during the sentencing phase.
The Court: All right, sir. Let it be so admitted.
After questioning Officer Nance for a short period of time, the defense objected again for the purpose of their argument concerning imprisonment, not pecuniary gain. The following occurred:
Q. What about these fees that people on the probation have to pay to their probation officer. What fees are those?
Defense: We are going to interpose and objection on top of the previous objection we made at this bench. That is not part of the proof that he had a sentence of imprisonment.
The Court: Where are we going.
State: Trying to determine the pecuniary gain, Your Honor.
The Court: Go ahead?
***756** "If no contemporaneous objection is made, the error, if any, is waived." *Walker v. State,* 671 So.2d 581, 597 (Miss.1995) (citing *Foster v. State,* 639 So.2d at 1270). This Court finds that the issue is procedurally barred.

¶ 186. Procedural bar aside, Howell's argument is also without merit. Officer Nance testified that a probationer had to pay a $25 monthly supervision fee and an extra $10 if a probationer fails a drug test. The prosecution in this case submitted an instruction which combined the pecuniary gain and the robbery into one aggravating factor. The portion of the instruction read as follows: "The capital offense was committed for pecuniary gain during the course of robbery." Thus, the instruction was given as one aggravating factor and not as separate factors.

¶ 187. In *West v. State,* the defense argued that the capital punishment statute is unconstitutional because "it fails to provide a principled distinction of death-eligible felony murderers, since the underlying felony is used both to elevate the defendant into the death-eligible class as well as to subsequently aggravate his felony murder conviction." *West v. State,* 725 So.2d 872, 894 (Miss.1998) . The Court in *West* stated that this "argument has been squarely rejected by this Court in *Ballenger v. State,* 667 So.2d at 1260-61, which noted that where the class is appropriately narrowed through legislative definition of the capital offenses, further narrowing is not required at the weighing stage." 725 So.2d at 895 .

[59] ¶ 188. In *Turner v. State,* 732 So.2d 937, 954-55 (Miss.1999) , this Court upheld a jury instruction which combined the pecuniary gain aggravator with an armed robbery. This Court held

that:
In sentencing instruction number one, only one aggravating factor was offered for the jury's consid ation:
1. The capital offense was committed for pecuniary gain during the course of an armed robbery.
Turner contends that under *Willie v. State,* 585 So.2d 660, 680-81 (Miss.1991) , this Court will not allow the jury "the opportunity to doubly weigh the commission of the underlying felony and the motive behind the underlying felony as separate aggravators." Turner alleges that in the present case sentencing instruction number one violated the spirit, if not the exact letter of the law.
In *Jenkins v. State,* 607 So.2d 1171, 1182 (Miss.1992) , this Court held, "in *Willie,* we clearly rejected the use of robbery and pecuniary gain aggravators finding that they were, in essence, just one." *See also Ladner v. State,* 584 So.2d 743, 762 (Miss.1991) ; *Willie v. State,* 585 So.2d 660, 680-81 (Miss.1991) .
Turner, 732 So.2d at 954-55. The jury instruction in this case is exactly the same as that given in *Turner,* albeit one was in the course of "armed robbery" while the other was "robbery." Accordingly, this issue is without merit.

XXIII. Introduction of a Prior Indictment

¶ 189. Howell contends that the trial court erred by allowing the State to introduce an indictment against him for the sale of a controlled substance. He argues that the indictment was not relevant and was highly prejudicial. Further, he relies on *Eubanks v. State,* 419 So.2d 1330 (Miss.1982) (simple assault case) and *Black v. State,* 418 So.2d 819 (Miss.1982) (burglary), for the general legal principle that trial testimony is confined to the charges for which the defendant is accused and must stand trial.

¶ 190. We previously discussed in issue XXI whether Howell was "under sentence ***757** of imprisonment" for the conviction of possession of a controlled substance at the time of the crime and its use as an aggravating factor. The fact of the matter is that Howell was actually indicted on a charge of *sale* of a controlled substance; however, he pled guilty to the reduced charge of *possession* of marijuana. On direct examination, Officer Nance testified that Howell was sentenced for possession of a controlled substance. On redirect examination, Officer Nance also stated that the original indictment was for the sale of a controlled substance, that being, marijuana.

[60] ¶ 191. The State argues that Howell's claim is procedurally barred for failure to cite relevant authority, that being, Howell relies upon two non- death penalty cases. We agree and in addition Howell has not provided any authority to support his argument that the indictment was not relevant and that it was highly prejudicial.

¶ 192. Procedural bar aside, this issue is still without merit. The State argues that the indictment was necessary to rebut the mitigator submitted by Howell that he has no significant history of prior criminal history. Further, the State maintains that the indictment was offered to demonstrate the validity of the sentencing order and rebut the mitigating evidence presented by Howell.

¶ 193. Indeed, this Court held that "[t]he State is allowed to rebut mitigating evidence through cross-examination, introduction of rebuttal evidence or by argument." *Wiley v. State,* 750 So.2d 1193, 1202 (Miss.2000) (quoting *Turner v. State,* 732 So.2d at 950).

¶ 194. As previously mentioned in Issue XXI, Officer Nance testified that Howell was "under sentence of imprisonment" pursuant to § 99-19-101(5)(a) . On cross-examination, defense counsel asked the following questions:

Defense: Mr. Nance, the crime for which [Marlon] Howell was charged, he pled guilty; is that correct?
Officer Nance: Yes, sir.
Defense: There was no trial or finding by jury. He came here and entered a guilty plea?
Officer Nance: Yes, sir.
Defense: And that was to possession of a controlled substance?
Officer Nance: That is what the order shows.
Defense: Did it reflect what the controlled substance was?
Officer Nance: The order does not say.
Defense: Do you have personal knowledge of what the controlled substance was?
Officer Nance: I do not.
Defense: Do you have any documents reflecting what it was?
Officer Nance: I don't have any with me. I was never his supervising officer. He went directly to the intensive supervision program.
Defense: This is the only on [sic] criminal conviction that you have a record of on Marlon Howell?
Officer Nance: That is the only thing that I know of personally.
Defense: Mr. Nance, **this particular crime that you have testified to is not one of violence** .
Officer Nance: No, sir.
Defense: As I understand under this supervision release program Mr. Howell was actually never sentenced to serve a term in Parchman was he?
***758** Officer Nance: Yes, sir. He was sentenced to serve a term in Parchman.
Defense: I understand he was sentenced to serve three years?
Officer Nance: Yes, sir.
Defense: My question is was he ever sentenced to go to Parchman?
Officer Nance: He was placed in the Intensive Supervision Program in lieu of transporting him to Parchman with the conditions that if he violated any of the terms and conditions of the Intensive Supervision Program he would be taken directly to Parchman.
Defense: He was released on his house arrest on February 11th of 2000?
Officer Nance: Yes, sir.
Defense: So he was released actually before his year was up?
Officer Nance: Yes, sir the court retained a 365 day right of review of him.
(emphasis added). The testimony that the defense elicited from Officer Nance was that (1) Howell was convicted of possession of a controlled substance; (2) the type of controlled substance was unknown to Officer Nance; (3) Howell pled guilty to a non-violent crime; and (4) whether the crime was punishable by a sentence to the penitentiary was called into question.

[61] ¶ 195. Clearly, the defense opened the door to redirect examination questions concerning the type of controlled substance in Howell's possession. The indictment indicated that the substance was marijuana. Furthermore, the indictment also stated that the punishment for sale of a controlled substance was imprisonment. Any question concerning whether Howell had a significant history of prior crime was resolved when the defense asked Officer Nance about Howell's prior crime. The indictment and testimony from Officer Nance concerning Howell's criminal history was offered to rebut the defense's inference that Howell ' prior crime was insignificant and did not warrant time served in the penitentiary. The indictment showed that the cause numbers in the indictment and the sentencing order were the same and that Howell pled to a lesser offense of possession. Further, the indictment pinpointed the specific controlled substance that was the basis for the charge against Howell. Accordingly, this issue is without merit.

XXIV. Sentencing Instruction S-2

¶ 196. Howell contends that the trial court erred by giving sentencing instruction S-2 which allegedly removed sympathy and mercy from the jury's consideration. He also alludes to the trial court refusing all of his sentencing instructions. Actually, Howell submitted one sentencing instruction, D-1, which comprised thirty-six pages of text. The trial court denied the instruction, but it stated that part of Howell's proposed instruction was incorporated into other instructions. This argument will be addressed more fully in the next issue.

[62] ¶ 197. There are two portions of Howell's proposed sentencing instruction D-1 that he argues contained proper mitigation language. Section three of sentencing instruction D-1 provided:
A mitigating circumstance is a fact which does not excuse the crime but which, in fairness and in *mercy*, you should consider as a reason to impose a sentence of life imprisonment rather than death. Marlon Howell does not have to prove the existence of mitigating circumstances beyond a reasonable doubt. Rather, you should find a mitigating circumstance to exist if there is any evidence in support of it. Furthermore, ***759** you, as individual jurors, must consider mitigating circumstances. Therefore, even if all other eleven jurors find that a certain mitigating circumstance does not exist, if you believe it does exist, you must find that mitigating circumstance, and weigh it in your further deliberations.
(emphasis added). Section five of the sentencing instruction D-1 provided:
Finally, each individual juror must decide whether death or life in prison is the appropriate punishment for this crime and for Marlon Howell. Even if aggravating factors outweigh mitigating factors, the law permits the jury to impose a sentence of life imprisonment out of *mercy* or a determination that life imprisonment is sufficient punishment under the circumstances.
(emphasis added). Jury instructions are within the sound discretion of the trial court. *Goodin v. State,* 787 So.2d at 657. In *Goodin,* this Court addressed the issue of mercy instructions and held:
This Court has repeatedly held that "capital defendants are not entitled to a mercy instruction." *Jordan v. State,* 728 So.2d 1088, 1099 (Miss.1998) (citing *Underwood v. State,* 708 So.2d 18, 37 (Miss.1998) ; *Hansen v. State,* 592 So.2d 114, 150 (Miss.1991) ; *Williams v. State,* 544 So.2d 782, 788 (Miss.1987) ; *Lester v. State,* 692 So.2d 755, 798 (Miss.1997) ; *Jackson v. State,* 684 So.2d 1213, 1239 (Miss.1996) ; *Carr v. State,* 655 So.2d 824, 850 (Miss.1995) ; *Foster v. State,* 639 So.2d 1263, 1299-1301 (Miss.1994) ; *Jenkins v. State,* 607 So.2d 1171, 1181 (Miss.1992) ; *Nixon v. State,* 533 So.2d 1078, 1100 (Miss.1987)). "The United States Supreme Court has held that giving a jury instruction allowing consideration of sympathy or mercy could induce a jury to base its sentencing decision upon emotion, whim, and caprice instead of upon the evidence presented at trial." *Id.* (citing *Saffle v. Parks,* 494 U.S. 484, 492-95, 110 S.Ct. 1257, 1262-64, 108 L.Ed.2d 415 (1990)). However, arguments to the jury are not the same as jury instructions. Miss.Code Ann. § 99-19-101(1) states in pertinent part: "The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death." Thus, it is appropriate for the defense to ask for mercy or sympathy in the sentencing phase. It is likewise appropriate for the State to argue to "send a message" in the sentencing phase. Again, neither side is entitled to a jury instruction regarding mercy or deterrence.
787 So.2d at 657-58. *See also King v. State,* 784 So.2d 884, 889 (Miss.2001) ("It should be noted further that neither side is entitled to a jury instruction regarding mercy or deterrence"); *Wiley v. State, State,* 750 So.2d 1193, 1204-05 (Miss.1999) . In *Wiley* this Court held:
[T]he jury received the "catch-all" instruction on mitigating circumstances. That is, the jury was instructed to consider, as a mitigating factor, any other matter, any other aspect of the defendant's character or record, and any other circumstance of the offense brought before them during the trial, which the jury, deemed to be mitigating on behalf of the defendant. "This Court long has accepted the use of a 'catch-all' to encompass any mitigating circumstances not specifically enumerated under Miss.Code Ann. § 99-19-101(6) ."

Wiley, 750 So.2d at 1205 (citations omitted).

¶ 198. A portion of instruction S 2 given to the jury stated:
You have found the defendant, guilty of the crime of [c]apital [m]urder. You must now decide whether the defendant ***760** will be sentenced to death or to life imprisonment without parole. In reaching your decision, you may objectively consider the detailed circumstances of the offense for which the defendant was convicted and the character and record of the defendant himself. You must consider and weigh any aggravating and mitigating circumstances, as set forth later in this instruction, but you are cautioned not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.
This portion of instruction S-2 amounts to a "catch-all" instruction.

[63] ¶ 199. In *Turner v. State,* 732 So.2d at 952, the instruction read to the jury was almost the same. This Court upheld the language in the *Turner* instruction which stated "You should consider and weigh any aggravating and mitigating circumstances, as set forth later in this instruction, but you are cautioned not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." *Turner v. State,* 732 So.2d at 952. *See also Evans v. State,* 725 So.2d 613, 690-91 (Miss.1997) ; *Holland v. State,* 705 So.2d 307, 351-52 (Miss.1997) . Indeed, this Court held that a defendant is not entitled to a sympathy or mercy instruction and allowing such an instruction results in a jury verdict that is based on "whim and caprice." *Id.* (citing *Holland v. State,* 705 So.2d 307, 351-52 (Miss.1997)). In *Turner,* this Court found that "pity", "mercy" and "sympathy" are synonymous. *Id.* Case law precedent clearly allows an instruction such as that given to the jury in this case. Accordingly, this issue is without merit.

XXV. Proposed Sentencing Instruction D-1

¶ 200. As a continuance of issue XXIV, Howell next contends that the trial court erred by denying his sentencing instruction D-1 and adequate sentencing instruction definitions. He asserts that the jury was precluded from being adequately informed as to the definition of aggravating and mitigating circumstances and the proper use of sympathy and mercy in the sentencing phase. Since the issue of sympathy and mercy were analyzed in the preceding issue, the Court need not address the same issue again.

[64] ¶ 201. No authority was provided by Howell in his brief other than a reference to the *Mississippi Model Jury Instructions Second Edition, Criminal, Mississippi Judicial College, 1999,* to support this entire issue. Accordingly, this issue is procedurally barred. *Simmons v. State,* 805 So.2d 452, 487 (Miss.2001) . *See also Mitchell v. State,* 792 So.2d 192, 202 (Miss.2001) (death penalty case where failure to cite any authority for an issue was a procedural bar).

¶ 202. Notwithstanding the procedural bar, the one sentencing instruction submitted by Howell, as referenced in the preceding issue, contained thirty-six pages of text consisting of twenty-nine sections. Many of the areas of instruction were not relevant to the issues present in Howell's case. In fact, Howell even acknowledged that some of the points were not applicable to his case.

¶ 203. The trial court incorporated part of Howell's sentencing instruction into the instructions given, stating:
Now as to the instruction submitted by the defendant, I think the court has taken part of that instruction and incorporated it into some of the instructions that the court has already mentioned
This Court has held the standard of review for jury instructions is as follows:

***761** [T]he instructions are to be read together as a whole, with no one instruction to be read alone or taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case. However, the trial judge may also properly refuse the instructions if he finds them to incorrectly state the law or to repeat a theory fairly covered in another instruction or to be without proper foundation in the evidence of the case.
Thomas v. State, 818 So.2d 335, 349 (Miss.2002) (quoting *Humphrey v. State,* 759 So.2d at 380). Furthermore, Howell requested no specific area of instruction to be considered on its own by the trial court, rather the instruction was submitted as a whole. [FN7] The trial court noted that part of the defense instruction was incorporated into some of the other instructions.

FN7. Howell also comments on what he considers a "disturbing trend in the trial court's refusal to grant defendant's theory of the case instructions and detailed sentencing instructions." In addition, Howell questions why instructions should be shortened when a person's life is at stake. Again, Howell submitted the instruction as a whole and did not ask for any specific instruction to be considered by the trial judge. The trial judge also stated that some of the defense instructions were incorporated into other instructions for the jury. We find that this contention is without merit.

[65] ¶ 204. As to Howell's assertion that the jury was not adequately informed of the definition of aggravating and mitigating circumstances, the instruction proves otherwise. The instruction read in part as follows:
You must consider and weigh any aggravating and mitigating circumstances, as set forth later in this instruction, but you are cautioned not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.
* * * *
Next, to return the death penalty, you must find that the **mitigating circumstances** (*those which tend to warrant the less severe penalty of life imprisonment)* do not outweigh the **aggravating circumstances** (*those which tend to warrant the death penalty).*
Consider only the following **elements of aggravation** in determining whether the death penalty should be imposed:
1) The capital offense was committed by a person under sentence of imprisonment, probation or parole.
2) The capital offense was committed for pecuniary gain during the course of a robbery.
You must unanimously find, beyond a reasonable doubt, that one or more of the preceding aggravating circumstances exists in this case to return the death penalty. If none of these aggravating circumstances are found to exist, the death penalty may not be imposed, and you shall write the following verdict on a sheet of paper:
"We the jury, find the defendant, Marlon Latodd Howell, should be sentenced to life imprisonment without parole."
If one or more of these aggravating circumstances is found to exist, then you must consider whether there are mitigating circumstances which outweigh the aggravating circumstance(s). Consider the following elements of mitigation in determining whether the death penalty should be not imposed.
1) Whether the defendant, Marlon Latodd Howell, has no significant history of prior criminal activity.
***762** 2) The age of the defendant Marlon Latodd Howell at the time of the crime.
3) The fact that Marlon Latodd Howell will not be eligible for parole or probation.
4) The sentence of co-defendant Adam Ray and Curtis Lipsey.
5) Any other matter, any other aspect of the defendant's character or record, and any other circumstances of the offense brought to you during the trial of this cause which you, the jury, deem to be mitigating on behalf of the defendant.

If you find from the evidence that one or more of the preceding elements of mitigation exists, then you must consider whether it (or they) outweigh(s) or overcome(s) the aggravating circumstance(s) you previously found. In the event that you find that the mitigating circumstance(s) do not outweigh or overcome the aggravating circumstance(s), you may impose the death sentence. Should you find that the mitigating circumstance(s) outweigh or overcome the aggravating circumstance(s), you shall not impose the death sentence.
(emphasis added). Clearly, the instruction defined the terms "aggravating" and "mitigating" for the jury as well as the exact elements of each. Indeed, in *Randle v. State,* 827 So.2d 705, 713 (Miss.2002) , this Court upheld instructions similar in form to the instructions at hand. The Court held that the instructions adequately placed the aggravating circumstances and the mitigating circumstances before the jury, clearly explained that the circumstances must be weighed against each other, and the appropriate sentence based upon the result of the weighing process. *Id.* Accordingly, this issue is without merit.

XXVI. Comments on the Victim, Pernell

¶ 205. Howell next contends that the trial court erred in allowing the State to refer to the victim in the closing argument. More precisely, Howell argues that the State's remarks comparing the victim, Pernell, to himself were highly inflammatory and prejudicial.

[66] ¶ 206. Counsel has wide latitude when arguing cases. *Wells v. State,* 698 So.2d 497, 506 (Miss.1997) ; Davis v. State, 530 So.2d at 702. "Where a prosecutor has made an improper argument, the question on appeal is 'whether the natural and probable effect of the improper argument of the prosecuting attorney is to create an unjust prejudice against the accused as to result in a decision influenced by the prejudice so created.' " *Wells v. State,* 698 So.2d at 507 (citing *Davis v. State,* 530 So.2d 694, 701 (Miss.1988)). *See also Bell v. State,* 725 So.2d 836, 851 (Miss.1998) (no error where prosecutor argued that murder victim planned to own his own store and stated that victim's life now was reduced to trial exhibits); *Conner v. State,* 632 So.2d 1239, 1276 (Miss.1993) (overruled on other grounds) (no error where prosecution referred to victim as a grandmother and not to forget her); *Hughes v. State,* 820 So.2d 8, 12 (Miss.Ct.App.2002) (no error where the prosecutor asked the jury "to imagine yourself closing your business or home being faced with a shotgun").

¶ 207. Howell relies upon *Willie v. State,* 585 So.2d 660, 679 (Miss.1991) for authority to support his position that the trial court erred by allowing the State to comment on the victim in closing argument. However, Howell does not cite any specific language from the State's closing arguments. In *Willie,* the defendant argued that the jury was asked to weigh the value of Willie's life against the victim. ***763** *Willie,* 585 So.2d at 679. This Court considered this issue procedurally barred for failure to object at the trial. *Id.* Despite the procedural bar, the Court went on to state that the comment was improper even though it was not considered a victim impact statement and had no bearing on Willie's moral culpability. *Id.* This Court finds that *Willie* is not persuasive to the issue sub judice.

¶ 208. During Howell's closing argument, Howell's counsel raised a number of points for the jury's consideration before making its decision. In essence, the defense counsel elaborated on how awful the whole situation was for Howell and his family. Defense counsel referenced that Howell was just 20 years old. Defense counsel further mentioned that Howell's family was physically unable to come and testify at the sentencing phase of the trial and that the sentence takes him away from his family. In addition, defense counsel stated that a life sentence for a 20 year old was basically a death sentence.

¶ 209. After Howell's closing argument, the State made its final arguments to the jury. The State's

closing argument emphasized that Howell was trying to "put a guilt trip" on the jury. In addition, the State argued that Howell did not want the jury to consider the victim. The State asked the jury to compare Howell, who murdered Pernell for money, to Pernell, a retired postal worker with a family who worked to earn money. Later, the State argued:

I dare put words in the mouth of the man I never met but I heard a lot about and you heard some about for this witness stand. But I bet you [Pernell] would tell you this. When you consider him to be mean or nice or whatever he would say I would like to see that may lay on death row a long long time. Let him think about what blast across my mind when I saw the fire coming from that barrel.

* * * *

Let me bring you back to that second in time before he died to ask what would he say. Did he get a chance to say goodbye to his family. No. What about asking God for forgiveness and mercy? No he died instantly. I expect he would like to see this defendant sit on death row and look down thinking about what will happen to him. Thinking about what the sentence will be like if carried out. I think he would at least want that.

The State also pointed out that by his actions, Howell not only ruined the lives of Pernell's family, he ruined the lives of his own family. As a final statement, the State requested that the jury consider the instructions and stated "don't let the guilt trip bother you."

[67] ¶ 210. This Court finds that the State's comments did not create an unjust prejudice against Howell which resulted in a decision influenced by prejudice. Attorneys have wide latitude in closing statements. *Wells*, 698 So.2d at 506. In the case sub judice, the State was asking the jury to be mindful of the facts and not be swayed by a "guilt trip" or sympathy. Further, the State was arguing aggravating factors by stating that Howell took the money for pecuniary gain as opposed to working for the money as did Pernell. The State also placed responsibility on Howell for ruining the lives of all involved. The State asked the jury to follow the instructions and not allow themselves to be swayed by a "guilt trip." This issue is without merit.

XXVII. Howell's Post-Trial Motion for a New Trial.

¶ 211. The trial court conducted a hearing on a motion for new trial. Howell argues that the trial court erred in denying ***764** his motion for new trial. Of particular concern, Howell cites to issue I (venue), XIII [FN8] (guilt phase instruction S-2 concerning whether § 97-3-19 specifically enumerate attempted robbery as an underlying offense for the conviction of capital murder), and XXVI (the prosecution's reference to the victim, Pernell, in the sentencing phase).

FN8. Howell cites issue XIII concerning guilt phase instruction S-2 in his brief to be of particular concern, however, at the hearing defense counsel argued sentencing phase instruction S-2 in issue XXIV. In either case, this Court had adequately addressed these issues and no further discussion is required.

[68] [69] [70] [71] ¶ 212. In *Birkley v. State*, 750 So.2d 1245, 1255 (Miss.1999) , this Court held that the standard of review for a post-trial motion is abuse of discretion. "A motion for new trial challenges the weight of the evidence. A reversal is warranted only if the lower court abused its discretion in denying a motion for new trial." *Edwards v. State*, 800 So.2d 454, 464 (Miss.2001) (citing *Sheffield v. State*, 749 So.2d 123, 127 (Miss.1999)) . "This Court will accept as true the evidence which supports the verdict and gives the benefit of all favorable inferences that may be drawn from the evidence to the prosecution." *Jefferson v. State*, 818 So.2d 1099, 1111-12 (Miss.2002) (citing *Edwards*, 800 So.2d at 465). The appellate court will not order a new trial "unless the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would

sanction 'unconscionable injustice.' " *McDowell v. State*, 813 So.2d 694, 699-700 (Miss.2002) (citing *Crawford v. State*, 754 So.2d 1211, 1222 (Miss.2000)); *Birkley v. State*, 750 So.2d at 1255; *McNeal v. State*, 617 So.2d 999, 1009 (Miss.1993) .

¶ 213. This Court has adequately addressed Howell's concerns in its discussion of the prior issues. Further, the trial court did not abuse its discretion in denying the post-trial motion for new trial. No unconscionable injustice is sanctioned by allowing the jury verdict to stand. Looking at all the evidence in the light that is most consistent to the jury verdict, there is substantial evidence in the record that reasonable and fair-minded jurors would have found Howell guilty of capital murder. Accordingly, this issue is without merit.

XXVIII. Proportionality of the Death Penalty in this Case

¶ 214. This Court must perform a proportionality review when reviewing a death sentence in a capital case pursuant to Miss.Code Ann. § 99-19- 105(3) (Rev.2000). Section 99-19-105(3) states:

(3) With regard to the sentence, the court shall determine:

(a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 99-19-101 ;

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; and

(d) Should one or more of the aggravating circumstances be found invalid on appeal, the Mississippi Supreme Court shall determine whether the remaining aggravating circumstances are outweighed by the mitigating circumstances or whether the inclusion of any invalid ***765** circumstance was harmless error, or both.

[72] ¶ 215. After reviewing the record in this appeal as well as the death penalty cases listed in the attached appendix, we find that Howell's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. The evidence is more than sufficient to support the jury's finding of the two statutory aggravating circumstances being namely, a capital offense committed in the course of a robbery for pecuniary gain and by person under a sentence of imprisonment, probation or parole. Further, in comparison to other factually similar cases where the death sentence was imposed. the sentence of death is neither excessive or disproportionate in this case. Finally, we find that the jury did not consider any invalid aggravating circumstances. Therefore, this Court affirms the death sentence imposed in this case.

CONCLUSION

¶ 216. Finding no reversible error, we affirm the judgment of the Union County Circuit Court.

¶ 217. **CONVICTION OF CAPITAL MURDER AND SENTENCE OF DEATH BY LETHAL INJECTION, AFFIRMED.**

SMITH, P.J., AND CARLSON, J., CONCUR. COBB, J., CONCURS IN PART AND IN RESULT. WALLER, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY PITTMAN, C.J., COBB AND CARLSON, JJ. GRAVES, J., JOINS IN PART. GRAVES, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY McRAE, P.J. DIAZ, J., NOT PARTICIPATING.

WALLER, Justice, Concurring:

¶ 218. While I concur with the majority opinion in the result of an affirmance of Howell's conviction and death sentence, I write to express reservations about an indigent defendant being refused funding for expert services because his attorney was acting pro bono.

¶ 219. We should encourage members of the Bar to take complex criminal cases pro bono. To deny a defendant what is customarily afforded an indigent defendant simply because counsel is pro bono sends the wrong message to the Bar and will have a chilling effect on attorneys volunteering to represent indigent defendants accused of capital offenses due to the costs associated with defending a capital case.

¶ 220. Other jurisdictions have addressed whether an indigent defendant who is represented by private counsel is entitled to public funds to retain an expert. The Delaware Supreme Court has set out a procedure to determine whether an indigent defendant represented by private counsel could receive public funding for expert services. *See Chao v. State,* 780 A.2d 1060, 1063 (Del.2001) . To receive funding, the trial court must determine whether (1) the defendant is indigent; (2) counsel is serving pro bono; (3) it would be inappropriate to require private counsel to withdraw in favor of a public defender; and (4) the services are necessary for adequate representation. *Id.*

¶ 221. Although a procedure similar to the one given by the Delaware court would not help Howell in the present case because he has shown no prejudice, it would be useful in future cases to encourage members of the Bar to volunteer to represent indigent criminal defendants with the assurance that the necessary tools for an adequate defense will be provided.

***766** PITTMAN, C.J., COBB AND CARLSON, JJ., JOIN THIS OPINION. GRAVES, J., JOINS IN PART.

GRAVES, Justice, Dissenting:

¶ 222. With deference to both my colleague on the circuit court and my colleagues in the majority, I am convinced that three errors below deprived Marlon Latodd Howell of a fair trial. Therefore, I respectfully dissent.

A. Failure to find that the State's peremptory strikes of African-American venire members was racially discriminatory.

¶ 223. Unfortunately in so many cases voir dire has become an exercise in finding race neutral reasons to justify racially motivated strikes. As Justice Marshall predicted, "[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge." *Batson v. Kentucky,* 476 U.S. 79, 105, 106 S.Ct. 1712, 1727, 90 L.Ed.2d 69 (1986) (Marshall, J., concurring). The case sub judice is another example of the improper use of peremptory strikes to exclude African-American jurors.

¶ 224. In this case, the State exercised peremptory challenges against Juror No. 34 ("High") and Juror No. 68 ("Wade"), **the only two African-American jurors on the venire** considered by the State for

service. The State exercised peremptory challenges on both jurors, thus eliminating any African-American jurors from service in the trial of Howell, an African-American defendant.

¶ 225. The State's proffered reason for striking juror High was that he had several arrests and a recent charge for public drunk. The State further indicated that one of the District Attorneys involved in the case had been in an automobile accident in front of High's brother's house and he believed that High had witnessed the accident but refused to tell officers what he had seen. As for juror Wade, the State indicated that there was an arrest warrant in Lee County issued for Wade for receiving stolen property and that Wade had not been forthcoming in his questionnaire as to criminal activity which would have prevented him from being fair and impartial.

¶ 226. It is fundamentally unfair that the reasons proffered by the State were not brought up, discussed with or produced to defense counsel at any time prior to or during voir dire. Further, the matters were never raised during voir dire of jurors High and Wade. Neither High nor Wade was given an opportunity to respond to the truthfulness or accuracy of these allegations. This is exactly the type of information that should be revealed prior to voir dire because without it the defense is denied the opportunity to evaluate and test the veracity and accuracy of the information which the State used as the basis for its challenges. A review of the record reveals that jurors High and Wade were never asked any specific questions by the State regarding the matters which were subsequently used as reasons to strike them.

¶ 227. In support of its alleged race-neutral reason for striking juror Wade the State produced Exhibit No. "1-A." While the first page of this exhibit refers to Anthony Wade, another last name appearing to be "Haney" was struck from the arrest warrant This exhibit also reflects that this charge was made in 1994 and was later dismissed in justice court without prosecution. This charge could have been dismissed for any number of reasons, one being that the State had charged the wrong person. The State failed to produce this information to defense counsel, ***767** failed to ask any questions regarding it, and failed to provide any indicia of reliability. Despite all of these failures, the State was allowed to strike an African-American from the venire. Further, the State presented no documentation to support its contention that juror High "had several arrests" and a recent charge for public drunk or that juror High in fact observed any accident in which the District Attorney had been involved.

¶ 228. This Court in *Mack v. State,* 650 So.2d 1289, 1298 (Miss.1994) , stated:
The failure to *voir dire* usually comes in to play when the prosecutor expresses some suspicion or uncertainty about the true situation involving the juror, such as when he "believes" that the juror is related to a criminal, or has been involved in some activities which might engender a negative attitude toward the defendant. This factor is closely related to the lack of an evidentiary basis. Here, the fact that Mitchell was unemployed was reflected in the jury questionnaire. The prosecutor was not acting on a mere suspicion. Still, *voir dire* on this issue may have revealed an explanation for this status which would not have been consistent with assumptions regarding the stability and community values of the unemployed. The failure to conduct *voir dire* must weigh against the state in an evaluation of the bona fides of the proffered reason.
In the *Batson* formulation, the relationship of the reason to the facts of the case is to be considered. The usual role given this circumstance is as another factor tending to show that the proffered reason is pretextual. *See Whitsey* 796 S.W.2d at 714-15; *State v. Slappy,* 522 So.2d 18, 23-24 (Fla.1988) . This too, must weigh against the state. Nothing about the facts of this case suggests that a juror's employment status should be an issue.

¶ 229. This Court, in *Mack,* went on to state that such a failure must be weighed in light of the

relative strength of the prima facie case of discrimination. In the case at bar, the defendant was black, the victim was white, the jury seated was all white, and the only two black venire members available for selection were struck by the State. If the State intends to use information obtained outside of the voir dire process, it must make that information available to the defendant before peremptory challenges are made so that the defendant has the opportunity to investigate the truthfulness and accuracy of the reasons given by the State in striking the only black jurors available for service.

¶ 230. Howell made a prima facie showing that the prosecutor exercised peremptory challenges on the basis of race. Howell has shown that the State failed to articulate the race-neutral explanation to strike the jurors in question and purposely eliminated any black jurors from sitting on a jury in the trial of a case involving a black man accused of killing a white man in a predominately white county. The race-neutral reasons given by the State were unexplored during voir dire and were based upon pretrial investigation of jurors High and Wade to which the defense was not privileged nor apprised of during voir dire examination.

¶ 231. This Court in *Mack*, 650 So.2d at 1299, declined to extend then Unif.Crim. R. Cir. Ct. 4.06 to information concerning prospective jurors. However, this Court did indicate that the prosecutor **may not** withhold information concerning a prospective juror which impacts upon the juror's ability to be fair and impartial. Allowing the State to present uncorroborated facts and information to the court in support of its peremptory challenge of black ***768** jurors **after** the voir dire process has been completed denies Howell the basic fairness guaranteed under the Constitution and rewards the State for failure to ask any relevant questions of High and Wade. I would urge this Court to expand *Mack*, in recognition of due process, and require pretrial disclosure of information concerning members of the venire and, at a minimum, require the party attempting to exercise the peremptory strike, to question the person who is the object of that strike, before it may challenge them.

B. Failure to allow Howell to conduct individual sequestered voir dire of jurors who indicated a predisposition in the case.

¶ 232. Prior to trial, defense counsel filed a motion requesting individual sequestered voir dire which the court reserved ruling on pending responses from the venire panel. Defense counsel again requested the right to individually voir dire jurors who had indicated they had read articles or seen information about the case on television and in particular inquire about the facts concerning the alleged motive of robbery and the mention of Howell's previous drug conviction in newspapers. The court denied these requests.

¶ 233. Howell should have been granted the opportunity to individually voir dire jurors to inquire as to opinions that these jurors had admitted to having on their juror information forms, and not taint other jurors who had expressed no prejudgment of Howell's guilt. In fact, 37 of the 59 jurors remaining for selection either responded that they had a relationship with the defendant, his family, the victim or his family, or had knowledge of the case, and in some cases the juror had formed an opinion. To require defense counsel to question jurors regarding their knowledge of Howell's criminal background, which had been discussed in local newspapers multiple times prior to the start of the trial, would have highly prejudiced Howell's chances of getting a fair and impartial jury.

¶ 234. This Court in *Carr v. State*, 655 So.2d 824, 842 (Miss.1995) , addressed the right of the defendant to conduct individual voir dire. The Court noted that under then existent Rule 5.05 of the Mississippi Uniform Criminal Rules of Circuit Court Practice, the defendant is granted the right to conduct individual voir dire at the discretion of the trial court. However, the trial court must be aware

of the heightened publicity surrounding capital murder cases and the possibility, if not probability, of tainting unbiased jurors with information gained outside of the courtroom. The U.S. Supreme Court has noted the importance of the ability to individually voir dire members of the venire in *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) , stating that the danger of general voir dire is that the panel members not only hear prejudicial information, but also learn the desired response to questions.

¶ 235. During voir dire, jurors repeatedly responded that they had knowledge of the facts of this case. To require the defendant to voir dire those jurors as to their knowledge of the defendant's previous criminal activity would contaminate the entire jury pool. Due to the persuasiveness of modern communication and the difficulty of erasing prejudicial publicity from the minds of jurors, the trial court should have allowed sequestered voir dire to eliminate prejudice and prejudgment of a jury sitting in the trial of a capital murder case.

C. Allowing the State, in closing argument, to refer to Howell's failure to tell somebody about his alibi defense or give details.

¶ 236. The prosecution in closing arguments stated: "If you had an alibi and ***769** were accused of Capital Murder, don't you think you would tell somebody about it. Don't you think you would give some details. Done something, that is common sense."

¶ 237. This Court noted in *Taylor v. State*, 672 So.2d 1246, 1266 (Miss.1996) , that the prosecution is prohibited from making a direct comment or reference by innuendo or insinuation to a defendant's failure to testify on his behalf. The prosecution's statement in closing argument here can only be construed as a comment on Howell's failure to take the stand and give details concerning his alibi. Considering that the prosecution was well aware of the two witnesses who testified as to Howell's whereabouts supporting his alibi, the prosecution's argument can only apply to Howell. In fact, the prosecution's use of the phrases "don't you think you would tell somebody, don't you think you would give some details", can, in my opinion, only be referring to Howell's failure to testify on his own behalf.

¶ 238. Because these three errors deprived Howell of a fair trial, I would reverse the circuit court's judgment and remand this case for a new trial.

¶ 239. It is for the foregoing reasons that I respectfully dissent.

McRAE, P.J., JOINS THIS OPINION.

APPENDIX
DEATH CASES AFFIRMED BY THIS COURT

Walker v. State, 815 So.2d 1209 (Miss.2002) . * following remand.

Bishop v. State, 812 So.2d 934 (Miss.2002) .

Stevens v. State, 806 So.2d 1031 (Miss.2002) .

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**770 *Woodward v. State*, 726 So.2d 524 (Miss.1997) .

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[FN*] *Shell v. State*, 554 So.2d 887 (Miss.1989) , *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) reversing, in part, and remanding, *Shell v. State*, 595 So.2d 1323 (Miss.1992) remanding for new sentencing hearing.

FN* Case was originally affirmed in this Court but on remand from U.S. Supreme Court, case was remanded by this Court for a new sentencing hearing.

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* *Clemons v. State*, 535 So.2d 1354 (Miss.1988) , *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) vacating and remanding, ***771** *Clemons v. State*, 593 So.2d 1004 (Miss.1992) remanding for new sentencing hearing.

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* *Shell v. State,* 554 So.2d 887 (Miss.1989) , *Shell v. Mississippi,* 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) reversing, in part, and remanding, *Shell v. State* 595 So.2d 1323 (Miss.1992) remanding for new sentencing hearing.

* *Pinkney v. State,* 538 So.2d 329 (Miss.1989) , *Pinkney v. Mississippi,* 494 U.S. 1075, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990) vacating and remanding, *Pinkney v. State,* 602 So.2d 1177 (Miss.1992) remanding for new sentencing hearing.

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860 So.2d 704

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2003

MARLON HOWELL,

Petitioner,

vs.

STATE OF MISSISSIPPI,

Respondent.

CERTIFICATE OF SERVICE OF MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, André de Gruy, a member of the Bar of this Court, hereby certify that on this 17th day of March 2004, I deposited at the main post office on South West Street, Jackson, Mississippi, the Petitioner's Motion for Leave to Proceed In Forma Pauperis to the Hon. William K. Suter, Clerk of the Supreme Court of the United States, and to Marvin L. White, Jr., Esq., Assistant Attorney General, Post Office Box 220, Jackson, MS 39205, [telephone number (601) 359-3680], counsel for the respondent herein. I further certify that all parties required to be served have been served.

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Counsel for Petitioner

*Counsel of Record

ORIGINAL

NO. 03-9560
IN THE UNITED STATES SUPREME COURT

OCTOBER 2003 TERM

MARLON LATODD HOWELL, AKA MARLON COX, *Petitioner*

versus

STATE OF MISSISSIPPI, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

I. **WHERE THE PETITIONER FAILED TO ASK THE COURT BELOW TO APPLY *ALABAMA V. BECK* AND SUBSEQUENT PRECEDENT OF THIS COURT, THE PETITIONER HAS FAILED TO PRESENT THE QUESTION AT THE PROPER TIME OR IN THE PROPER MANNER; THEREFORE, THIS COURT HAS NO JURISDICTION TO CONSIDER THE CLAIM, AND CERTIORARI SHOULD BE DENIED.**

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NO. 03-9560

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2003 TERM

MARLON LATODD HOWELL, AKA MARLON COX, *Petitioner*

versus

STATE OF MISSISSIPPI, *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Mississippi Supreme Court is reported at *Howell v. State*, 860 So. 2d 704 (Miss. 2003). This opinion is before this Court as Appendix A to the petition for certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C.A. § 1257. He fails to do so.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the U.S. CONST., AMEND. VIII and XIV. He fails to do so.

STATEMENT OF THE CASE

A. Statement of Facts

This case arises from the May 15, 2000, capital murder of Hugh David Pernell, a retired postal worker who was delivering newspapers on a residential street in New Albany, Mississippi, in the early morning hours of that tragic day. Shortly after 5:00 a.m., Pernell was flagged down by another vehicle (which was occupied by Petitioner Marlon Howell and his friends co-indictees Adam Ray and Curtis Lipsey). Petitioner approached the driver's window of Pernell's car and shot Pernell in the heart with a Saturday Night Special. Pernell's foot hit the gas pedal, and his vehicle sped into another car that was parked in a nearby driveway. As a result, Petitioner Howell, Lipsey, and Ray fled the scene.

The murder occurred in front of the home of Charles Rice, who was watching television in his living room as he prepared for work. Rice, prompted by the sound of a horn honking, went to his window. From this vantage point, he saw the two cars come to a stop and he then witnessed the entire crime. The next day, Rice viewed a lineup and unequivocally identified Petitioner as the killer.

The motive for the crime was robbery. Petitioner and his friends had been riding around all night. Petitioner was looking for someone to rob, because he owed supervision

and other fees to his probation officer. Petitioner had received documents that indicated he would be jailed, if payment was not made that very day – May 15, 2000. As Petitioner stated to his friends, he "needed to make a sting," and he was looking for "an easy lick." Otherwise, he would be "locked up."[1]

By 5:00 a.m., when Petitioner saw Pernell driving down the street, Petitioner was desperate. When Pernell sped away from the scene, Petitioner's plans were foiled. Petitioner Howell, Lipsey, and Ray went immediately to the home of their friend, Brandon Shaw. Lipsey and Ray told Shaw that Petitioner Howell "shot somebody." Petitioner asked Shaw to take him home immediately. Petitioner hid the murder weapon behind Shaw's house, and Shaw took Petitioner home to Blue Mountain, Mississippi. Petitioner Howell, known by his cohorts as "Chiefa", ordered all those involved not to tell anyone.

Contrary to Petitioner's direction, his friends confessed to authorities the next day. When subsequently questioned by the police, Petitioner Howell claimed to have been in Corinth, Mississippi with a woman all night. However, at trial, Petitioner's family testified that he was at home in Blue Mountain at the time of the crime. The facts of this case, as found by the Mississippi Supreme Court, are more explicitly detailed in paragraphs two through nineteen of the opinion below. *See Howell*, 860 So. 2d at 712-15.

---

[1]Petitioner asserts that "[t]he evidence of attempted robbery was weak." This assertion is clearly contrary to the Mississippi Supreme Court's detailed findings and ultimate conclusion that there was "ample" evidence on this point. *Howell*, 860 So. 2d at 738-39.

B. Procedural History

On June 29, 2000, Petitioner was indicted (along with Curtis W. Lipsey and Adam Ray) for capital murder. In March, 2001, Petitioner was tried before the Union County Circuit Court and convicted of capital murder. A separate sentencing hearing was conducted, after which, the jury found the following:

> 1. That the defendant actually killed Hugh David Pernell.
> 2. That the defendant, Marlon LaTodd [sic], attempted to kill Hugh David Pernell.
> 4. That the defendant contemplated that lethal force would be employed.
>
> Next, we, the jury, unanimously find that the aggraviting [sic] circumstances of:
>
> 1. The capital offense was committed by a person under sentence of imprisonment, probation or parole.
> 2. The capital offense was committed for pecuniary gain during the course of a robbery.
>
> exist beyond a reasonable doubt and are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and we unanimously find that the defendant, Marlon LaTodd Howell, should suffer death.
>
> /s/ Greg Langston
> Foreman of the Jury

Thereafter, Petitioner's Motion for a New Trial was denied. He appealed to the Supreme Court of Mississippi and raised the following issues for consideration by that court:

I. Whether the trial court erred in denying a change of venue.

II. Whether the trial court erred in denying Howell access to county funds in order to employ an investigator, a jury consultant, a daily transcript, and additional counsel to assist with his defense.

III. Whether the trial court erred in failing to quash the jury panel.

IV. Whether the trial court erred in finding that the State's use of peremptory strikes did not violate *Batson*.

V. Whether the trial court erred in denying Howell's request for individual sequestered voir dire.

VI. Whether the trial court erred in limiting Howell's voir dire examination.

VII. Whether the trial court erred in admitting Rice's eyewitness identification testimony.

VIII. Whether the trial court erred in admitting Howell's statement.

IX. Whether the trial court erred in allowing witnesses to testify as to statements that Howell made.

X. Whether the trial court erred in allowing Shaw to testify as to statements made by co-defendant, Ray.

XI. Whether the trial court erred in refusing to allow Howell to re-cross-examine Shaw after the State's re-direct examination.

XII. Whether the trial court erred in denying Howell's request for a directed verdict.

XIII. Whether the trial court erred in granting the State's instruction S-2, which referred to attempted robbery; and whether Mississippi Code Annotated, Section 97-3-19 does not specifically enumerated attempted robbery as an underlying offense for conviction of capital murder.

XIV. Whether the trial court erred in granting the State's instruction S-6 which did not instruct the jury on simple murder and manslaughter; and whether the trial court erred in denying Howell's instructions D-13 and D-18 on the crime of simple murder and manslaughter.

XV. Whether the trial court erred in denying instruction D-3 on the weight of the evidence.

XVI. Whether the trial court erred in denying instruction D-8 on the jury's consideration of testimony of a law enforcement officer.

XVII. Whether the trial court erred in denying instruction D-16 as to cross-racial eyewitness identification.

XVIII. Whether the trial court erred in denying Howell's motion for a mistrial and renewed motion for change of venue based upon a juror's father allegedly sitting on front row of audience with victim's family.

XIX. Whether the trial court erred in allowing the district attorney, in closing argument, to refer to Howell's failure to tell somebody about his alibi defense or give details.

XX. Whether the trial court erred in denying a twenty-four (24) hour "cooling off" period before the jury considered sentencing.

XXI. Whether the trial court erred in the sentencing phase by allowing evidence of Howell's previous conviction for possession of marijuana as an aggravating factor.

XXII. Whether the trial court erred in the sentencing phase by allowing evidence of fees due from Howell during his probation as double use of the same robbery element and pecuniary gain element in the guilt and sentencing phase.

XXIII. Whether the trial court erred in the sentencing phase by allowing the introduction of the indictment against Howell on a charge of sale of controlled substance, marijuana.

XXIV. Whether the trial court erred in granting sentencing instruction S-2 because it allegedly removed the issue of sympathy and mercy from consideration by the jury, improperly listed aggravating factors of imprisonment and pecuniary gain, and failed to instruct the jury on how to properly weigh mitigating factor against aggravating facts and define what mitigating and aggravating factors are.

XXV. Whether the trial court erred in denying Howell's sentencing instruction.

XXVI. Whether the trial court erred in the sentencing phase by allowing the district attorney to refer to the victim, Pernell, his work, his loss, and what Pernell might say if he were still alive.

XXVII. Whether the trial court erred in denying Howell's post-trial motion for a new trial.

Howell, 860 So. 2d at 715-17.

In addition, the Mississippi Supreme Court, pursuant to state statute, considered *sua sponte* the following issue:

XXVIII. Whether the imposition of the death penalty is excessive or disproportionate in this case.

Id. at 717, 764-65.

The Supreme Court of Mississippi rejected Petitioner's claims and affirmed his conviction and sentence October 23, 2003. Petitioner's subsequent motion for rehearing was denied December 18, 2003. From this affirmance, Howell brings the instant petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioner raises one claim, which is wholly unsupported by and contradictory to the actual record in this case. Because Petitioner raises this claim for the first time in his petition for writ of certiorari, the claim is not within the jurisdiction of this honorable Court. Ultimately, Petitioner presents no cognizable claim under the Constitution or statutes of the

United States upon which relief can be granted. Therefore, the State of Mississippi respectfully submits that certiorari should be denied.

ARGUMENT

I. WHERE THE PETITIONER FAILED TO ASK THE COURT BELOW TO APPLY *ALABAMA V. BECK* AND SUBSEQUENT PRECEDENT OF THIS COURT, THE PETITIONER HAS FAILED TO PRESENT THE QUESTION AT THE PROPER TIME OR IN THE PROPER MANNER; THEREFORE, THIS COURT HAS NO JURISDICTION TO CONSIDER THE CLAIM, AND CERTIORARI SHOULD BE DENIED.

Petitioner asserts that he was improperly denied an instruction on the lesser-included offense of murder,[2] in violation of the Eighth and Fourteenth Amendments. In support of his argument, Petitioner cites *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382 (1980), and its progeny. This constitutional argument was not raised before the Mississippi Supreme Court. Therefore, Respondent respectfully submits that this Court is without jurisdiction to hear this issue. *See Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889 (1981); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354 (1969); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1162 (1969).

Rather, the only issue before the Supreme Court of Mississippi was whether, under Mississippi law, the evidence was sufficient to support a murder instruction.[3] *Howell*, 860

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[2]As noted elsewhere herein, Petitioner raised before the State courts the sufficiency of the evidence to support both a murder instruction and a manslaughter instruction. It appears that Petitioner has abandoned his previous claim regarding the denial of the manslaughter instruction and is only raising the denial of the murder instruction before this Court.

[3]Indeed, as Petitioner acknowledges, the Mississippi Supreme Court in considering the issue before it (*i.e.*: the sufficiency of the evidence to support lesser included offense instructions) did not "address the federal constitution." (Petition at 3). This is because the Mississippi Supreme Court was never asked to consider, much less "address", the federal constitutional claims now raised by

So. 2d at 741-44. As the Mississippi Supreme Court clearly held, the evidence in this case did not support a murder instruction. Therefore, Petitioner's claim to the contrary is without factual basis.[4] *See, generally, Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct 2781, 2789 (1979) (setting forth deferential standard of review for factual issues determined by State court).

It is also noteworthy that – even if this Court had jurisdiction of this question (which is disputed) – *Beck* and the subsequent cases cited by Petitioner do not apply in a case where the evidence fails to support a murder instruction.

> The *Beck* opinion considered the alternatives open to a jury which is constrained by a preclusion clause and therefore unable to convict a defendant of a lesser included offense when there was evidence which, if believed, could reasonably have led to a verdict of guilt of a lesser offense. In such a situation, we concluded, a jury might convict a defendant of a capital offense because it found that the defendant was guilty of a serious crime. 447 U.S., at 642, 100 S.Ct., at 2391. Or a jury might acquit because it does not think the crime warrants death, even if it concludes that the defendant is guilty of a lesser offense. *Id.*, at 642-643, 100 S.Ct., at 2391-2392. While in some cases a defendant might profit from the preclusion clause, we concluded that "in every case [it] introduce[s] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Id.*, at 643, 100 S.Ct., at 2392.
>
> The Court of Appeals, quoting this statement from our *Beck* opinion, repeatedly stressed the words "in every case." 639 F.2d, at 223-224; 628

Petitioner before this Court.

[4]Howell alleges that the jury could have believed that he approached the vehicle to sell Pernell drugs. There was no such evidence presented at trial, and Howell cites to no such evidence that was submitted to the jury. The only evidence before the jury was that Howell needed money to pay his probation officer that day. He had ridden around all night looking for someone to rob, and, finally, he besieged the victim in this case.

F.2d, at 401. It concluded that we meant that the Alabama preclusion clause was a "brooding omnipresence" which might "infect virtually every aspect of any capital defendant's trial from beginning to end." *Ibid.* **It is important to note that our holding in *Beck* was limited to the question submitted on certiorari, and we expressly pointed out that we granted the writ in that case to decide whether a jury must be permitted to convict a defendant of a lesser included offense "when the evidence would have supported such a verdict."** 447 U.S., at 627, 100 S.Ct., at 2384. Thus, our holding was that the jury must be permitted to consider a verdict of guilt of a noncapital offense "in every case" in which "the evidence would have supported such a verdict."

* * *

Beck held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But **due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction.** The jury's discretion is thus channelled so that it may convict a defendant of any crime fairly supported by the evidence.

Hopper v. Evans, 456 U.S. 605, 610-11, 102 S. Ct. 2049, 2052-53 (1982) (emphasis added).

Thus, *Beck* has basically been limited to its own facts, and does not apply to the instant case. *See Id. See also Hopkins v. Reeves*, 524 U.S. 88, 98-99, 118 S.Ct. 1895, 1901-02 (1998) (holding that *Beck* does not apply where state statute is distinguishable, in that manslaughter is not a lesser-included offense under Nebraska law). In addition, the *Beck* case is also wholly distinguishable because the Alabama statute at issue in *Beck* "specifically prohibited [the trial judge] from giving the jury the option of convicting the defendant of a lesser included offense." *Beck*, 447 U.S. at 628, 100 S. Ct. at 2384.

Mississippi's capital sentencing scheme contains no such preclusion clause.[5] For all these reasons, Petitioner's arguments on this point are, not only beyond the scope of this Court's jurisdiction, but they are also without merit.

CONCLUSION

For the above and foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

JUDY THOMAS MARTIN
SPECIAL ASSISTANT ATTORNEY GENERAL
Counsel of Record

BY: Judy Thomas Martin
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---

[5]To the contrary, under Mississippi law, "[a] lesser-included offense instruction is required only 'where a reasonable juror could not on the evidence exclude the lesser-included offense beyond a reasonable doubt.'" *Jackson v. State*, 684 So. 2d 1213, 1229 (Miss. 1996) (quoting *Mackbee v. State*, 575 So. 2d 16, 23 (Miss. 1990). *See also* Miss Code Ann. § 99-17-20 (cited by Petitioner) ("The judge, in cases where the offense cited in the indictment is punishable by death, may grant an instruction for the state or the defendant which instructs the jury as to their discretion to convict the accused of the commission of an offense not specifically set forth in the indictment returned against the accused.").

CERTIFICATE

I, Judy Thomas Martin, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above **Brief in Opposition** to the following:

Andre de Gruy
Counsel for Petitioner, and
Counsel of Record
510 George Street, Suite 300
Jackson, MS 39202

Duncan Lott
Counsel for Petitioner
P.O. Box 382
Booneville, MS 38829

This the 20th day of April, 2004.

Judy Thomas Martin
JUDY THOMAS MARTIN

STATE OF MISSISSIPPI

OFFICE OF THE ATTORNEY GENERAL

JIM HOOD
ATTORNEY GENERAL

CAPITAL LITIGATION DIVISION

April 20, 2004

Honorable Chris Vasil
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

RE: Marlon Latodd Howell, a/k/a Marlon Cox v. State of Mississippi
NO: 03-9560

Dear Clerk:

Enclosed for filing please find the original and ten (10) copies of respondent's **BRIEF IN OPPOSITION** in the above styled and numbered cause. By copy of this letter I am serving counsel opposite.

Thank you for your assistance in this matter.

Sincerely,

Judy T. Martin
Special Assistant Attorney General

JTM/dsm

Enclosures

cc: Andre de Gruy, Esquire
Duncan Lott, Esquire

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(1)

Supreme Court, U.S.
FILED
JUL 20 2004
OFFICE OF THE CLERK

No. 03-9560

IN THE

Supreme Court of the United States

MARLON HOWELL,

Petitioner,

vs.

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOINT APPENDIX

ANDRE de GRUY *
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* Counsel of Record

PETITION FOR CERTIORARI FILED MARCH 17, 2004
CERTIORARI GRANTED JUNE 28, 2004

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SUPREME COURT OF MISSISSIPPI
CIRCUIT COURT OF THE STATE OF MISSISSIPPI

No. UK-2000-82

STATE OF MISSISSIPPI,
Plaintiff,

v.

MARLON LATODD HOWELL,
Defendant.

DOCKET ENTRIES

DATE	ORDERS, JUDGMENTS, ETC.
06/29/2000	Indictment filed
06/29/2000	Capias issued and handed to Union County Sheriff
06/30/2000	Capias executed returned and filed
07/25/2000	Waiver of Arraignment and Entry of Plea filed.
07/25/2000	Order filed. Bk 42-504
07/25/2000	State's Response to Request for Discovery and State's Demand for Reciprocal Discovery Filed.
07/26/2000	Rule 9.04 Motion filed.
07/26/2000	Motion to reveal the deal filed.
07/26/2000	Motion for serverance filed.
07/26/2000	Motion to be appraised of order of trial where the death penalty will be sought and which statutory aggravated circumstances the state will rely on filed.

DATE	ORDERS, JUDGMENTS, ETC.
08/04/2000	Subpoena Duces Tecum as to State of Mississippi, Union County filed as to WVTA issued and mailed to attorney filed.
08/09/2000	Motion for continuance filed.
08/09/2000	Subpoena Duces Tecum as to Mickey Baker, Jimmy Parker, & to Personnel Director for New Albany Police Department, (T. Kent D. Grisham, C. Glasson, J. Collier, C. Kenner, N. Treadaway, D. Stout, Jr, B. Kirk issued and mailed to attorney.
08/11/2000	Subpoena Duces Tecum, as to WTVA executed returned and filed.
08/11/2000	Order of setting filed. BK 42 Pages 600-607
08/16/2000	Motion to Quash Subpoena Duces Tecum filed.
08/20/2000	Subpoena Duces Tecum as to Mickey Baker, Jimmy Parker, and Personnel Director for New Albany Police Department executed returned and filed.
08/20/2000	Order allowing attorney's fee and expenses filed. BK 42 P6
08/21/2000	Itemized statement for compensation and expenses of court-appointed counsel filed. BK 42
08/22/2000	State's Motion for Omnibus Hearing filed.
08/22/2000	Motion to Quash Subpoena Duces Tecum filed.
08/28/2000	Petition for Writ of Habeas Corpus Ad Prosequedan filed.
09/01/2000	Petition for Writ of Habeas Corpus Ad Prosequendum filed.
09/01/2000	Writ of Habeas Corpus Ad Prosequendum filed.

DATE	ORDERS, JUDGMENTS, ETC.
09/01/2000	Order for Writ of Habeas Corpus Ad Prosequendum filed. BK 42 page 710
09/05/2000	Order for Deliver of Defendant filed. BK 43 Page 6
09/05/2000	Order for Writ of Habeas Corpus ad Prosequendum filed. BK 43-Page 5
09/05/2000	Motion for Change of Venue (with exhibit "A"-"M") filed.
09/13/2000	Order filed. BK 43-63
09/13/2000	Order filed. BK 43-64
10/30/2000	Order of Setting filed. BK 43 pages 222-227
11/09/2000	State's Response to request for Supplemental Discovery and State's Demand for reciprocal discovery filed.
01/18/2001	State's Response to Request for Supplemental Discovery and State's Demand for reciprocal discovery filed.
02/09/2001	Order setting trial and scheduling order filed. BK 43 p 530
02/09/2001	Order denying motion for change of venue filed. BK 43-531
02/09/2001	Order quashing subpoena duces tecum filed. BK 43-532
02/14/2001	Motion to suppress filed.
02/14/2001	Motion to suppress filed.
02/14/2001	Motion for funds for an investigator filed.
02/14/2001	Motion for additional peremptory challenges filed.

DATE	ORDERS, JUDGMENTS, ETC.
02/14/2001	Motion to suppress identification and testimony filed.
02/14/2001	Motion to prohibit jury dispersal and to prohibit jury's exposure to victims family or friends filed.
02/14/2001	Defendant's Motion in Limine filed.
02/14/2001	Motion for discovery of evidence presented to the Grand Jury in this case filed.
02/14/2001	Motion for Individual Sequestered Voir Dire, and Sequestration of Jurors during Voir dire and throughout the trial filed.
02/14/2001	Motion to control prejudicial publicity filed.
02/14/2001	Motion for Special Venire facias filed.
02/14/2001	Motion to invoke rule prior to Voir Dire, prohibit witness from conversing, and to rejoin the District Attorney from advising witnesses of previous testimony filed.
02/14/2001	Motion to declare unconstitutional the exclusion of 18-20 years old venire persons from the jury to try this case filed.
02/14/2001	Motion to declare unconstitutional the exclusion of illiterates and exemption of over 65 years old venire persons from the jury to try this case filed.
02/14/2001	Motion to disclose the past and present relationships Associations and ties between the district attorney and prospective jurors filed.
02/14/2001	Memorandum of law in support of motion to control prejudical publicity filed.
02/14/2001	Assertion of right to be present filed.

DATE	ORDERS, JUDGMENTS, ETC.
02/14/2001	Motion for opportunity to rehabilitate any prosepective juror who expresses reticence when asked to kill a fellow human being filed.
2/14/2001	Motion to require the State to furnish proposed jury instructions twenty-four hours prior to trial filed.
02/14/2001	Motion for appointment of jury selection consultant filed.
02/14/2001	Motion to strike the death qualification voir dire question and to limit disqualification for particular views on punishment filed.
02/14/2001	Motion for full recordation filed.
02/14/2001	Motion for individual voir dire total recordation and sequestration of jurors during voir dire filed.
02/14/2001	Application for the issuance of the Writ of Habeas Corpus Ad Testificandum filed.
02/14/2001	Application for the issuance of the writ of Habeas Corpus Ad Testificandum filed. (Adam Ray)
02/14/2001	Application for the issuance of the writ of Habeas Corpus Ad testificandum filed. (Curtis Lipsey)
02/14/2001	Rule 9.05 Alibi Defense filed.
02/14/2001	Motion for an order requiring that juror questionnaires be sent with the juror summons to each venire person filed.
02/14/2001	Rule 9.04 Discovery Filed.
02/16/2001	Order of setting filed. BK 43 Pages 541-548

DATE	ORDERS, JUDGMENTS, ETC.
02/21/2001	State's response to request for supplemental discovery and State's demand for reciprocal discovery filed.
02/26/2001	State's Notice of Aggravating circumstances filed.
02/26/2001	Scheduling Order filed. BK 43-578.
03/01/2001	Petition for psychiatric examination filed.
03/01/2001	Motion to preclude the prosecution form using peremptory challenges to exclude black persons and members of other groups filed.
03/01/2001	Motion for jury view of the execution process filed.
03/01/2001	Motion to assure that mitigation circumstances received their due weight and attention from the jury filed.
03/01/2001	Notice of intent to introduce co-indictees sentences in mitigation filed.
03/01/2001	Motion to instruct jury on three sentencing options and bar any inaccurate speculation concerning the possibility of future release filed.
03/01/2001	Motion to prohibit imposition of Capital Punishment in this case and to preclude the prosecution from seeking to rely on Miss. Code (99-19-101(7)(a)(b)(c) or (d) filed.
03/01/2001	Motion for twenty-four hour cooling off period between conclusion of the Culpability Phase and the start of any sentencing phase fo this trial filed.

DATE	ORDERS, JUDGMENTS, ETC.
03/01/2001	Motion to declare Mississippi's Capital Punishment Scheme Unconstitutional, or, in the alternative, to construe is Statutory Mitigating Circumstances to filed.
03/01/2001	Motion to bar death penalty as cruel, unusual and degrading punishment filed.
03/01/2001	Motion to suppress evidence seized after illegal arrest filed.
03/01/2001	Motion for process instructions filed.
03/01/2001	Motion to preclude the sheriff's department from bringing Mr. Howell into court in shackles, and to limit the number of uniformed officers in the courtroom filed.
03/01/2001	Motion to preclude admission of gruesome and highly prejudicial color photographs of deceased.
03/01/2001	Motion for instruction informing the jury that a life sentence means life without parole in this case filed.
03/01/2001	Motion for opportunity to rehabilitate any prospective juror who expresses reticence when asked to kill a fellow human being filed.
03/01/2001	Motion for compensation of jurors at current wages and for reimbursement of promary care costs filed.
03/01/2001	Motion for disclosure of any possible basis of judicial recusal filed.
03/01/2001	Motion to Bar Admission of inflammatory and prejudicial matters concerning the victims filed.

DATE	ORDERS, JUDGMENTS, ETC.
03/01/2001	Motion for discovery of any possible basis for disqualification of the prosecuting attorney filed.
03/01/2001	Motion to bar use of certain aggravating circumstances filed.
03/01/2001	Motion for limited daily transcripts during trial filed.
03/01/2001	Motion to preclude the State from relying on any Non-statutory aggravating circumstances filed.
03/01/2001	Motion to declare Miss. Code Ann. (97-3-19(2)(e) Unconstitutional, or to preclude the prosecution from relying on Miss. Code Ann. (99-49-101(5)(d) as an aggravating circumstance at defendnat's Capital trial filed.
03/01/2001	Motion to prohibit prosecutorial misconduct filed.
03/02/2001	Petition for Writ of Habeas Corpus Ad Testificandum as to Adam Ray filed.
03/02/2001	Order for Writ of Habeas, Corpus Ad Testificandum filed. BK 43-Page 616
03/02/2001	Writ of Habeas Corpus Ad Testificandum as to Adam Ray filed.
03/02/2001	Petition for Writ of Habeas Corpus Ad Testificandum as to Curtis Lipsey filed.
03/02/2001	Order for Writ of Habeas Corpus Ad Testificandum as to Curtis Lipsey filed.
03/02/2001	Writ of Habeas Corpus Ad Testificandum as to Curtis Lipsey Filed.
03/02/2001	Petition for Writ of Habeas Corpus Ad Testificandum as to Deatrick Knox filed.

DATE	ORDERS, JUDGMENTS, ETC.
03/02/2001	Order for Writ of Habeas Corpus Ad Testificandum as to Deatrick Knox filed. BK 43 page 614
03/02/2001	Writ of Habeas Corpus Ad Testificandum as to Deatrick Knox filed.
03/02/2001	Petition, Order and Writ of Habeas Corpus Ad Testificandum as to Curtis Lipsey, Adam Ray and Deatrick Knox faxed to MDOC.
03/05/2001	Request for subpoenas for Monday March, 26, 2001 issued and handed to Union County Sheriff.
03/06/2001	Agreed Order for Psychiatric Examination filed. 43 654-655
03/08/2001	State's response to request for supplemental discovery and state's demand for reciprocal discovery filed.
03/09/2001	Motion to Quash Jury Panel Filed.
03/09/2001	State's response to request for supplemental discovery and state's demand for reciprocal discovery filed.
03/09/2001	State's response to request for supplemental discovery and State's demand for reciprocal discovery filed.
03/12/2001	Defendant's Motion in limine filed.
03/12/2001	Motion for Court Appointed Assistance filed.
03/12/2001	State's response to request for supplemental discovery and State's demand for reciprocal discovery filed.

DATE	ORDERS, JUDGMENTS, ETC.
03/21/2001	State's response to request for supplemental discovery and State's demand for reciprocal discovery filed.
03/22/2001	Application for the issuance of the Writ of Habeas Corpus Ad Testificandum filed.
03/22/2001	Order for Writ of Testificandum filed. BK 44-77
03/22/2001	Writ of Testificandum as to James T. Simmons III filed.
03/22/2001	Order of Writ and Writ of Testificandum faxed to Lee County
03/23/2001	Jury Instruction D-15, D-16, D-17 filed.
03/23/2001	Supplemental Rule 9.04 discovery filed.
03/23/2001	Response to discovery request filed.
03/23/2001	State's response to request for supplemental discovery and State's demand for reciprocal discovery filed.
03/23/2001	Jury Instruction No. S-1 thur S-9 filed.
03/23/2001	Sentencing instruction No. 1 thur 4 filed.
03/26/2001	Jury List filed.
03/26/2001	Court Instruction No. 1, 2, 3, and 4 filed.
03/26/2001	Jury Instruction D-1 thur D-18 filed.
03/27/2001	Court's sentencing instruction No. 1, 2, 7, 8 filed.
03/27/2001	Court instruction No. 5 filed.
03/28/2001	State's response to request for supplemental discovery and State's demand for reciprocal discovery filed.

DATE	ORDERS, JUDGMENTS, ETC.
03/29/2001	State's response to request for supplemental discovery and State's demand for reciprocal discovery filed.
03/30/2001	Sentencing instruction No. 2, filed.
03/30/2001	Order filed. (Court Reporter) Bk 44 P 114
03/30/2001	Jury verdict filed.
03/30/2001	Judgment of the Court and Sentence to death filed.
03/30/2001	Committment order filed.
03/30/2001	Jury Verdict filed.
03/30/2001	Defendant Instruction #1 (Selected Sample Penalty Phase Requests to Charge)
04/06/2001	Motion for new trial filed.
04/16/2001	Affidavit of poverty filed.
04/16/2001	Post-Trial motion to proceed in forma pauperis on appeal filed.
05/14/2001	Notice of hearing filed.
05/17/2001	Petition for Writ of Habeas Corpus Ad Testificandum filed.
05/18/2001	Order Authorizing payment filed. BK 44 P 357-358 (Region III Mental)
05/18/2001	Order Authorizing payment filed. Bk 44, P 359-360 (Steven Hayne)
05/18/2001	Certified copies of Order Authorizing Payment to Steven Hayne and Region III Mental handed to Union County Board of Supervisors.

DATE	ORDERS, JUDGMENTS, ETC.
05/23/2001	Petition for Writ of Habeas Corpus Ad testificandum filed.
05/23/2001	Order for Writ of Habeas Corpus Ad Testificandum filed.
05/23/2001	Order for deliverance of defendant filed.
05/23/2001	Petition, Order for Writ of Habeas and order for deliverance of defendant faxed to MDOC.
06/14/2001	Order Denying Defendant's Motion for New Trial and Granting Defendant's Post-Trial Motion to proceed in Forma Pauperis on Appeal and Appointing Counsel on Direct Appeal filed. BK 44-582
06/27/2001	Notice of Appeal filed.
06/28/2001	Order filed. 45-12 (Board of Supervisors to pay Supreme Court $100.00)
07/02/2001	Notice to Court reporter to transcribe appellant's designation of record filed.
07/19/2001	Order Filed. 45-59 (Billy Stanford)
07/23/2001	Letter from Margaret Fair to Hon. Duncan Lott filed.
07/24/2001	Letter from Anita Moss to Hon. Lott filed.
07/27/2001	Order filed. 45-95 (to pay court reporter)

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

2001-DP-01104-SCT

MARLON LATODD HOWELL,
Appellant,

v.

STATE OF MISSISSIPPI,
Appellee.

Union Circuit Court
Trial Court Case # UK-2000-82
The Honorable R. Kenneth Coleman
Ruling Date 3/30/2001

DOCKET ENTRIES

DATE	PROCEEDINGS
6/27/2001	Notice of Appeal Filed
7/13/2001	Notice of Retention by the Supreme Court
7/13/2001	Case Info Sheet received
7/13/2001	Notice of Criminal Disposition
7/13/2001	Trial Court Order received
7/13/2001	Trial Court Order received
7/13/2001	Correspondence received—Trial Court Clerk—Hon. Billy Stanford
7/13/2001	Final Judgment
7/13/2001	Docket Entries

DATE	PROCEEDINGS
7/13/2001	The Death Penalty Questionnaire has been issued.
7/16/2001	Court Reporter Transcript Due Date issued—Maggie Fair
7/16/2001	Court Reporter Transcript Due Date issued—Anita Moss
7/23/2001	Appearance Form received—Duncan L. Lott
7/24/2001	Phone call
7/25/2001	Correspondence received—Court Reporter—Anita Moss
8/29/2001	Demand Letter Issued—Trial Court Clerk—Billy Stanford
9/12/2001	Correspondence received-James M. Hood, III
9/24/2001	Record Filed
9/24/2001	Briefing Schedule Notice Issued.
10/3/2001	Order Entered
10/4/2001	Death Penalty Questionnaire has been re-issued —Trial Court Judge—Kenneth R. Coleman
1/14/2002	Motion # 2002-222 Motion to Exceed Page Limitation of Appellant's Brief
1/17/2002	Clerks Notice Issued Motion # 2002-222
1/28/2002	Motion # 2002-468 Motion for Additional Time
2/4/2002	Appellant's Brief filed on behalf of Marlon Latodd Howell
2/4/2002	Record Excerpts filed on behalf of Marlon Latodd Howell

DATE	PROCEEDINGS
2/5/2002	Brief Addendum filed on behalf of Marlon LaTodd Howell
2/14/2002	Order Entered Motion # 2002-468
6/4/2002	Motion # 2002-2298 Motion for Enlargement of Time within which to file Appellee's Brief
6/12/2002	Order Entered Motion # 2002-2298
7/8/2002	Motion # 2002-2641 Motion for Enlargement of Time within which to File Appellee's Brief
7/11/2002	Order Entered Motion # 2002-2641
8/5/2002	Motion # 2002-2956 Motion for Enlargement of Time Within Which to File Appellee's Brief
8/12/2002	Response filed Motion # 2002-2956
8/20/2002	Order Entered Motion # 2002-2956
9/4/2002	Motion # 2002-3269 Motion for Enlargement of Time within which to File Appellee's Brief
9/9/2002	Order Entered Motion # 2002-3269
10/4/2002	Motion # 2002-3582 Motion to Suspend Rule 28(g) for Enlargement of Page Limitation
11/1/2002	Order Entered Motion # 2002-3582
11/1/2002	Appellee's Brief filed on behalf of State of Mississippi
11/12/2002	Motion for Time for Filing Brief—Duncan L. Lott
11/12/2002	Clerks Notice Issued
11/21/2002	Motion # 2002-4051 Motion for Additional Time
11/25/2002	Order Entered Motion # 2002-4051

DATE	PROCEEDINGS
1/9/2003	Reply Brief filed on behalf of Marlon Latodd Howell
3/26/2003	Case Argued and Submitted
3/27/2003	Argument Disk Received and Placed in Vault.
4/18/2003	Appearance Form received—Judy T. Martin
10/23/2003	DECISION: Affirmed
10/31/2003	Motion # 2003-3386 Rule 40 Motion for Rehearing
11/14/2003	Letter Issued by Clerks Office
12/18/2003	Rehearing Denied Motion # 2003-3386
12/29/2003	Mandate Issued
1/21/2004	Order Entered
1/23/2004	Motion # 2004-192 Motion for Clarification of Order
7/2/2004	Motion # 2004-1969 Motion to Recall and Stay Mandate

IN THE CIRCUIT COURT OF
UNION COUNTY, MISSISSIPPI

[Filed March 26, 2001]

NO. UK-2000-82

STATE OF MISSISSIPPI,

VS.

MARLON LATODD HOWELL.

JURY INSTRUCTION D-13

If you fail to find the defendant, Marlon Howell, guilty of capital murder, then you should continue your deliberations to consider the elements of the felony crime of simple murder. If you find from the evidence in this case beyond a reasonable doubt that Marlon Howell on or about May 15, 2000, in Union County, Mississippi, killed David Pernell, a human being in the commission of an act imminently dangerous to others and evidencing a depraved heart, regardless of human life, without authority of law, even though the defendant had no premeditated design to affect the death of any particular individual, then you should find the defendant, Marlon Howell, guilty of murder. If the State has failed to prove any one or more of these elements beyond a reasonable doubt, then you should find the defendant, Marlon Howell, not guilty of murder.

If you fail to find the defendant, Marlon Howell, guilty of simple murder, then you should continue your deliberations to consider the elements of the felony crime of manslaughter.

If you find from the evidence in this case beyond a reasonable doubt that:

1. Marlon Howell on or about May 15, 2000, in Union County, Mississippi;

2. Killed David Pernell;

3. By gunshot; and

4. Marlon Howell was negligent or acted with wanton disregard for human life, and the negligence was so gross as to be tantamount to a wanton disregard of, or utter indifference to the safety of human life; and

5. Such negligence or wanton disregard, if any, directly caused the death of David Pernell, then you shall find the defendant guilty of manslaughter.

If the prosecution has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find the defendant not guilty.

IN THE CIRCUIT COURT OF
UNION COUNTY, MISSISSIPPI

NO. UK-2000-82

STATE OF MISSISSIPPI,

VS.

MARLON LATODD HOWELL.

JURY INSTRUCTION D-18

THE COURT instructs the jury that if you find the defendant, Marlon Latodd Howell, not guilty of "capital murder" as charged in the indictment, then you should continue your deliberations to determine whether the defendant, Marlon Latodd Howell, has committed the lesser crime of "simple murder."

The crime of "simple murder" is distinguished from the crime of "capital murder" by the absence of, or by the failure of the State to prove, the following element of the offense of "capital murder", to wit:

> the defendant, Marlon Latodd Howell, did kill the said Hugh David Pernell at a time when the said Marlon Latodd Howell was engaged in the commission of the crime of robbery of the said Hugh David Pernell.

THEREFORE, if you find from the evidence under this case beyond a reasonable doubt that:

1) Hugh David Pernell was a living human being; and

2) the defendant, Marlon Latodd Howell, did kill the said Hugh David Pernell in Union County, Mississippi, on or about the 15th day of May, 2000; and

3) the defendant, Marlon Latodd Howell, acted unlawfully, willfully, and feloniously, without authority of law, and with the deliberate design to effect the death if Hugh David Pernell, then you shall find the defendant, Marlon Latodd Howell, guilty of capital murder.

If you fail to find the defendant, Marlon Howell, guilty of simple murder, then you should continue your deliberations to consider the elements of the felony crime of manslaughter.

If you find from the evidence in this case beyond a reasonable doubt that:

1. Marlon Howell on or about May 15, 2000, in Union County, Mississippi;
2. Killed David Pernell;
3. By gunshot; and
4. Marlon Howell was negligent or acted with wanton disregard for human life, and the negligence was so gross as to be tantamount to a wanton disregard of, or utter indifference to the safety of human life; and
5. Such negligence or wanton disregard, if any, directly caused the death of David Pernell, then you shall find the defendant guilty of manslaughter.

If the prosecution has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find the defendant not guilty.

IN THE CIRCUIT COURT OF
UNION COUNTY, MISSISSIPPI

No. UK-2000-82

STATE OF MISSISSIPPI,

vs.

MARLON LATODD HOWELL.

TRANSCRIPT OF JURY INSTRUCTION CONFERENCE
TRIAL TRANSCRIPT PAGES 968-987

[968] the case form or express any opinion.

(JURY OUT).

BY THE COURT: I know you have had an opportunity to go over at least be aware of each others instructions. I have an idea you save a lot of time to spend with them. But what do you anticipate on the instruction issue as far as the guilt phase. Do you see any real problems?

BY MR. LOTT: Your Honor, I think we are going to probably have some real issues concerning our issues on the robbery and the instructions of the court to the jury on those issues. And the underlying facts we may take a little bit to take care of that. I think we can take care of those in a reasonable amount of time but I don't think we would be able to do that and do closing arguments to the jury and get this case to them today. I would prefer ask the court to allow us to do closing arguments first thing in the morning and let them have it in the morning.

BY THE COURT: Well it's 3:25 now my experience has been in these types cases that even when I hear that we don't

have any problem with jury instructions we normally have a serious problem with jury instructions. So I don't doubt that this one will be a lot different than that. We will have the jury come [969] back in the morning at 8:30 and we will stay here and work on these instructions until we get them hammered out. And I might as well make my remarks now sooner or later. I guess everybody in here has tried cases with me before and y'all are all good lawyers, very capable and comparable lawyers and I am not going to spend my night y'all have that in mind when we start on jury instructions.

BY THE COURT: Let's have the jury.

(JURY IN).

BY THE COURT: Members of the jury it's according to my watch it's almost 3:30. And the State and the defendant have rested. The State is not going to have any rebuttal and as I indicated to you earlier when we were doing voir dire the next step in the jury trial process is the court will instruct you concerning the law as it should be applied to the facts of the cases as you have heard them during the course of this trial. Now, I wouldn't have you think that we are going to have to go back and start from scratch and research the law in great detail as to each one of these instructions that will be given but it does take some period of time and the course in a case of this magnitude sometime it can take a fairly lengthy period of time to get the instructions prepared. Quite frankly I doubt if we could get them prepared and get ready for closing arguments before 6:00 or 7:00 o'clock and we are just not going to do that. So I'm going to let you [970] go for the evening and I'm going to ask the bailiff to have you back here in the morning at 8:30 and we will be prepared at that time to hear the final arguments of the attorneys. Then I will and this will be only the guilt phase as I indicated to you. Then you will have an opportunity to hear the closing argument of the attorneys after you have been instructed by the Court then you will go back in the jury room and begin your deliberation

towards reaching a verdict if possible. Now I admonish you again under your oath as jurors don't discuss this case with anyone; don't allow anyone to discuss it with you or in your presence; don't read watch or listen go anything at all about this case in any news media of any kind. Certainly don't talk to anyone that has been identified as a party or witness or could have been a possible party or witness. And don't form or express any opinion concerning the guilt, or innocence of this defendant until you have heard the instructtions of the court and the argument of counsel. And I trust that you will have I pleasant evening. I will look forward to seeing you back here in the morning at 8:30. Show the jury out Mr. Armstrong. Everyone remain seated while the jury leaves.

(Jury Out)

INSTRUCTION NO. COURT-1:

BY THE COURT: The defendant is present his attorney's are present. State's attorneys are present. Let's look at these jury instructions just a minute. The court is going to give court instruction [971] number 1 this is which is just the Court's general instruction and I don't have a copy for y'all but if you want to look at it you are welcome to. You did have a copy of it. I haven't looked through these. Has anybody submitted a burden of proof instruction?

BY MR. LOTT: Yes, sir.

INSTRUCTION NO. COURT-2:

INSTRUCTION NO. COURT-3:

BY THE COURT: I will give our three then. Glad y'all have a copy of these. Two is the courts burden of proof instruction. I will give it. It's a little different than the one you were talking about. And then all right. Look at Court's four.

BY MR. HOOD: You are going to give your three, Your Honor.

BY THE COURT: Yes, sir.

INSTRUCTION NO. COURT-4:

BY THE COURT: And the Court's four which is 12 person verdict instruction or whatever.

INSTRUCTION NO. COURT-5:

BY THE COURT: And then five and five court will give courts instruction number. Then let's take a look at the State's instruction.

INSTRUCTION NO. S-1:

BY THE COURT: Then let's take a look at S-1. Have you had an opportunity look at S-1.

BY MR. LOTT: Yes, sir.

BY THE COURT: Have any objection to it.

BY MR. LOTT: Your Honor, in the second paragraph. The second paragraph says if you find from the [972] evidence under in this case I think that word under needs to come out. If you find from the evidence in this case. Mine has the word under.

BY THE COURT: Wait a minute. Let me see here now in the second numbered. So I will remove I will mark it out.

BY MR. LOTT: And the numbered paragraph number 3 we would object to the "or without" on the deliberate design. We think it's the proper should be with deliberate design should be some design or intent.

BY MR. HOOD: That case, *Berry versus State*, addresses that, Your Honor.

BY THE COURT: I think so. Unless you have something Mr. Lott that you can.

BY MR. LOTT: Cover my basis.

BY THE COURT: Given

INSTRUCTION NO. S-2:

BY THE COURT: S-2.

BY MR. LOTT: Your Honor, we would object to S-2 on the basis that numbered paragraphs 1, 2 and 3 refer to the attempt to take and the indictment as well as the court's instruction S-1 refers to that he was indicted and charged for committing a robbery. Not attempting and this would be a variance from the indictment and we would object to any reference to an attempted robbery.

BY MR. HOOD: Your Honor, the statutory definition of robbery includes, is inclusive of attempt and if you attempt to commit an armed robbery then all [973] though you don't complete it by actually taken that property it's still armed robbery. There is a statutory prohibition against indicting for attempts when the crime is complete the robbery is defined under 97-3-79 and it in the definition of robbery is the word attempt. Every person that shall feloniously take or attempt to take from the person so it's the State's would submit that the robbery was complete when the attempt occurred and under 97-1-9 it prevents us from charging some one with attempt. In other words we would if we had indicted him for attempted robbery and we actually proved that he committed robbery under the robbery statute then we would be we would have been out on directed verdict.

BY THE COURT: What about this fact that you have got it one way in one instruction and one in the other.

BY MR. HOOD: I believe we ought to have it consistent. I didn't notice any inconsistencies. We would move to correct.

BY THE COURT: It says robbery. Doesn't go into that business. All right, your objection is noted. I will give the instruction.

BY MR. LOTT: For the record, I want to make one other point on that deal. I do not believe that the capital murder

statute provides for attempted robbery as an underlying felony. It allows for robbery so that would be in addition

[974] INSTRUCTION NO. S-3:

BY THE COURT: S-3.

BY MR. LOTT: Your Honor, mine that I have for the State are unnumbered. Which one is that.

BY THE COURT: It's the one that says lessor included offense of simple murder.

BY MR. HOOD: We were planning on withdrawing that one, Your Honor, if that is S-3. We don't believe there is any evidence to support a murder.

BY THE COURT: Do you want to withdraw it that is what you said.

BY MR. HOOD: The one that I have aren't numbered.

INSTRUCTION NO. S-4, AND S-5:

BY THE COURT: Only thing I have left is S-6. All I have is S-6. Christine said you had withdrawn S-4 and 5. 6 is form of the verdict.

INSTRUCTION NO. S-6:

BY THE COURT: 6 is the form of the verdict. All 12 of you must agree the verdict should be written, if you find from the evidence quote we find him guilty or quote we find him not guilty. The form of the verdict instruction.

BY THE COURT: Given. Let me see the defendant's instructions.

BY MR. LOTT: Your Honor, on S-6 I got one page. Do you have more than one page?

[975] BY THE COURT: No, sir.

BY MR. LOTT: So paragraph three is the end of that that is S-6 that has been submitted. We would object to S-6 on the

basis that it does not include the lessor offense of simple murder and then also we would object t[illegible]t that it does not include the lessor offense of manslaughter. We think under the testimony that has been presented to this jury they could reasonably return a verdict on either one of those instead of capital murder. And also if they failed to find either one of those, I think the instructions got to advise is just if they fail to find him guilty or something to the effect that he was I think the jury needs to be advised judge that if they find he wasn't present when Mr. Pernell was killed. He is not guilty period and they could cease their deliberations and we prepared such.

BY MR. HOOD: That is in your alibi.

BY MR. LOTT: It's in the alibi but it's not instructing they can do that. Your Honor, the State's previous instructions number 3 that y'all previously withdrew I think that is a proper instruction for simple murder.

BY THE COURT: Let me look at your form of the verdict that you submitted.

BY MR. LOTT: Well, Your Honor, the form of the verdict that I have. He has instructions on the lessor included offense.

BY MR. LOTT: I think S-3 should be [976] given I know the State withdrew it. I know S-3 should be given on the issue of simple murder. We have an instruction that incorporates S-3 that we would withdraw down to the part about the manslaughter that we think should be given in addition to the simple murder which is defendant's 13 which is one we referred to simple murder and then went on to refer to man slaughter. I would agree to the State's S-3 on the issue of simple murder but I would ask that we also include our paragraph about manslaughter in addition to that.

BY MR. LUTHER: Until we get to the issue of lessor included offenses decided we can't be the one with the form

of the verdict basically we got to see how many options we have before we come up with the form of the verdict.

BY THE COURT: I'm going to hold instruction S-6 but I'm going to look at your instructions.

INSTRUCTION NO. D-1 AND D-2:

BY THE COURT: D-2.

BY MR. HOOD: I had D-1.

BY MR. LOTT: That was the same as court's 3 we agreed to withdraw one for the courts 3.

BY MR. HOOD: Your Honor, this instruction was condemned in *Barns versus State*. It is an unreasonable invasion of the province of the jury to determine what is a reasonable duty where it talks about the language of mere probability of guilt. Is an [977] invasion of that. Barns is that *Barns versus State* is at 532 So.2d 1231 specific page site 1235. It's a Mississippi 1988 Supreme Court case and it was a murder and the court stated the reasonable doubt defines itself and therefore needs no definition by the court. And the actual language in that Barns instruction where the court properly was found to have refused it contained similar language that specifically quoted in that Barns decision. It was the court's instruction the jury that if you believe from the evidence in this case that there is a probability of innocence of the defendant then there is a reasonable doubt. It goes on and contains language similar to that contained here. I do know of one case in which our Supreme Court has upheld a definition of reasonable doubt and that is *Conner versus State*. And of course this doesn't contain that language but I believe in Conner at page 12 well Conner is at 632 So.2d. 1256 and 57. Wherein the court upheld this instruction which says the court instructs the jury that a reasonable doubt of guilt may arise either from the evidence or lack of evidence or conflict of the evidence. And if upon consideration of all the evidence in this

case or lack of it or the conflict of it such reasonable doubt does exist then it is your sworn duty as jurors to return a verdict of not guilty. That, Your Honor, I believe is only.

BY THE COURT: I am going to give the instruction. I am going to amend it by the first complete sentence after of the period strike out [978] beginning with the word "there". Strike the next two sentences and the last one of which ended with the word "defendant". That is as I recall those cases but that is what I remember about it. And I will strike this out. If y'all want to submit a clean copy in conformity you can with the strike that will be all right to but I do have something that I can mark it completely out with. Be given as amended.

INSTRUCTION NO. D-3: D-3.

BY MR. HOOD: This is the weight of the evidence instruction and I particularly, I believe first instruction were to cover how to address testimony but I know that this last paragraph has been held in *Bell versus State*, 411 So.2d, page 463, specific page 765. It's a Mississippi Supreme Court case 1982 wherein the court held it was proper to refuse a comment on the weight of the evidence in which in that decision the actual instruction that was rejected is quoted as being, saying the court instructs the jury that it's your duty not to consider the quantity of the witnesses testifying but rather the quality of their testimony. I submit to the court what this instruction is saying is the same thing, you may find that your testimony smaller number of witnesses on any fact more credible than the larger number. I don't think it's proper to comment on the weight of the evidence and I think that whole instruction does that but, I know, particularly about that quantity and quality that was rejected in Bell.

BY THE COURT: All right. I am going to [979] refuse the instruction.

INSTRUCTION NO. D-4:

BY THE COURT: D-4.

BY MR. LOTT: We would withdraw 4.

BY THE COURT: Withdrawn four.

INSTRUCTION NO. D-5: D-5.

BY MR. HOOD: Your Honor, I believe that's proper statement of the law. We don't object to it.

INSTRUCTION NO. D-6:

BY THE COURT: D-6.

BY MR. LOTT: We will withdraw D-6, Your Honor.

INSTRUCTION NO. D-7:

BY THE COURT: D-7.

BY MR. HOOD: Your Honor, I think it's a comment on-the evidence. It talks about the credibility an impeached testimony it talks about proof of general bad character.

BY THE COURT: I don't recall it being supported by the evidence. Unless defense counsel if they can provide me with some case that this has been given.

BY MR. LOTT: This was a model jury instruction that I got out of our book. I think it's warranted in this case because we did have Mr. Cox on the issue of impeaching the testimony of Mr. Lipsey. We have had issues concerning motives of witnesses and criminal cases. There are felony convictions that are [980] pending and I think it's proper for the jury in this case specially with the testimony we had to be instructed on this point.

BY THE COURT: I will give the instruction.

INSTRUCTION NO. D-8:

BY THE COURT: D-8.

BY MR. HOOD: We would object to this instruction on—case.

BY THE COURT: I am going to refuse the instruction.

INSTRUCTION NO. D-9:

BY THE COURT: D-9.

BY MR. HOOD: Your Honor, this is an if you will indulge me until I find a page cite.

BY THE.COURT: What is wrong with it Mr. Hood.

BY MR. HOOD: I was thinking that this was one of those that talked about the defendant is a witness in his own right.

BY MR. LOTT: Your Honor, this came out of model jury instructions. I know I don't know enough.

BY THE COURT: I am going to give it. All right.

INSTRUCTION NO. D-10:

BY THE COURT: D-10 alibi.

BY MR. HOOD: Your Honor, I don't have any objection to it other than on the very last full line it says the defendant has the benefit of any [981] reasonable doubt. I would request that sentence be stricken and use proper burden of proof a reasonable doubt.

BY THE COURT: Given as amended.

INSTRUCTION NO. D-11: D-11.

BY MR. HOOD: We would object to it, Your Honor. It's not supported by the facts. The defendant in this case did not testify.

BY MR. LOTT: There were statements about a testimony about a statement he gave though judge. And I think and the statement is in essence it's kind of an unusual situation. The statement has not had anything to do with the commission of a crime. It really has to do with the alibi. So I think

it's all the more reason that they should be instructed that that statement should not be used to consider whether or not he committed.

BY THE COURT: Which statement are you talking about. I am talking about the one where they said he was at some girls house. It's not a statement where he is implicated. It's usual sense when we have somebody giving a statement implicating themselves in a crime.

BY THE COURT: I will refuse the instruction. You have it for the record.

INSTRUCTION NO. D-12: D-12.

BY MR. LOTT: We are withdrawing 12, Your Honor.

INSTRUCTION NO. D-13:

BY THE COURT: D-13.

[982] BY MR. LOTT: Now 13 is the one that I mentioned to you earlier first part pertains to the simple murder and I think the State's S-3 that was previously submitted and withdrawn would be a better instruction on the simple murder. However the last paragraph concerning the felony of manslaughter we would ask that that be joined with S-3 or if the court determines that manslaughter is not proper then we are submitting that simple murder is proper. I don't want a commingle with what manslaughter and the other and have them both effectively removed. I think it's a case by case situation.

BY MR. HOOD: We object to both request for a murder and manslaughter instruction. We object to a simple murder instruction and we object to a man slaughter instruction because neither of those instructions are supported by the evidence. We don't we couldn't prove simple murder if we wanted to. We don't have any. We don't have the intent. The murder to prove a simple premeditated murder. So, that is why I say that it's not a murder. This instruction is not supported by the facts of this case. They didn't know the

victim so obviously he didn't have any other than to rob them and kill him other than the robbery motive. So therefore we are saying that there is no evidence of premeditation and deliberate design which is a necessary element to prove simple murder. Whereas the evidence is sufficient to prove capital murder. And I believe the same thing would go for a manslaughter [983] instruction if the instruction they have submitted is based upon a negligence, gross culpable negligence manslaughter. We disagree that they should-be entitled to that instruction because if you are committing the crime of armed robbery and regardless of whether it's negligence or whatever, whatever this case is whether it's with or with out deliberate design and you kill some one you are guilty of capital murder and not manslaughter.

BY MR. LOTT: Judge, I agree with him but the point that I think is going to be argued strongly by us is there is no proof of a robbery.

BY THE COURT: They are putting their burden on that.

BY MR. LOTT: But then they say well there is no proof of a robbery but we think he shot this man what is the jury going to do then.

BY MR. HOOD: Their defense is not that this man shot him. There defense is alibi.

BY MR. SMITH: We are entitled to bring up whatever defenses we want. Mr. Rice testified there was absolutely nothing to believe there was a robbery going on. This jury can find that this man was there and did shoot Mr. Rice. But that, I mean Mr. Pernell but based on Mr. Rice's testimony there was no robbery going on and therefore whatever for whatever reason he shot him it's manslaughter.

BY THE COURT: I'm going to refuse the instruction. That leaves. I'm going to put D-6 [984] back on the table and y'all are going to have D-2 retyped as I understand it.

BY MR. LOTT: Are you refusing our request to use State's 3 that was withdrawn also.

BY THE COURT: Yes, sir.

BY THE COURT: All right.

BY MR. LOTT: Would you like for me, Your Honor, since I'm going to have her type that other one submit an instruction tomorrow so you can rule on it.

BY THE COURT: You do not need to do it unless you want to do it for the record. Here is your you have a note. Okay in the morning. Get here a few minutes.

BY THE COURT: Let me ask y'all this—

INSTRUCTION NO. D-l5, D-16, D-17:

BY MR. LOTT: Judge I'm sorry. 15, 16, 17, and I am withdrawing 15 but I'm going to give it to you. D-16. I think he did send him to us.

BY THE COURT: I am going to refuse instruction D-16 unless you have some authority that you sprung on me that I haven't found any authority for it any where.

BY MR. LOTT: It's would be from another jurisdiction. It's not from Mississippi.

BY THE COURT: It will be refused and it may wind up being the law in this State some day but, I don't think it is right now. 17.

BY MR. HOOD: Your Honor, there was a case styled *Warren versus State* in which the court held [985] or court approved a similar eye witness instruction or similar eye witness instruction that *Warren versus State*, I don't have the, it's a Mississippi 1998 Supreme Court case. It had about five elements that you had to consider and I know Mr. Lott has proposed three. I believe a couple are left out. Such as how certain is the witness of the identification. So I would like to

submit the instruction that has been approved and all I have is a copy of it in booklet, if I can let counsel read it may be they can agree to it.

BY THE COURT: Y'all take a look at it and we will be here about 10 minutes before time and y'all choose one of those or something. Okay. In the morning.

(OVER NIGHT RECESS WAS TAKEN).

BY THE COURT: How long are y'all going to want to argue by the way.

BY MR. HOOD: 45 minutes to the side.

BY MR. LOTT: I kind of feel like I will need 45 minutes. 45 to the side and the State will divide theirs.

BY MR. LOTT: Mr. Smith and I will divide ours.

BY THE COURT: And everybody wants what kind of warning?

BY MR. LOTT: I would like about I needs about five with mine also. Mr. Smith, will go first and I will last. State wants to on each segment.

[986] BY THE COURT: We want to go back and finish these instructions that we lack a few on. The State submitted two new instructions

INSTRUCTION NO, S-8, S-9:

BY THE COURT: Let's take the State's instructions first then. S-8. Mr. Lott, Mr. Smith, have you had an opportunity to look at it.

BY MR. LOTT: Yes we have. We would intend duplicate of D-17 on identification testimony: I believe it's D-17, Your Honor. They both touch the same basis. I think they are both good instructions. I think the court can decide which one.

BY MR. HOOD: Judge, this instruction came out of a quote and I have it here. It's *Davis versus State*, 568 So.2d 277. It's a Mississippi Supreme Court case 1990. The State would submit that D-17 does not contain the additional two considerations for the jury to consider. In Davis they listed five. And I will give you Davis. And this is where they quote that language. It doesn't contain the five elements at the bottom.

BY THE COURT: I am going to refuse D-17 and I will give S-8. S-9.

BY MR. LOTT: Your Honor, S-9 is, I don't have any objection.

BY THE COURT: Be given. All right.

INSTRUCTION NO. D-17: Now let's take a look at the instructions submitted by the defendant this morning.

[987] This D-17 is preemptory instruction.

BY MR. LOTT: Yes, sir.

BY THE COURT: It will be refused. D-2 is instruction as amended. Have y'all looked at the amendment on it.

BY MR. HOOD: Yes, sir, I believe it's properly amended to the courts instruction.

BY THE COURT: Be given.

INSTRUCTION NO. D-18: D-18.

BY MR. LOTT: Your Honor, D-18 is just a for the sake of the record and recompilation of what I asked.

BY THE COURT: I see. I will refuse it then for part of the record.

BY THE COURT: So that we are all on the same page. Mr. Hood, Mr. Lott, you had something.

BY THE COURT: Court instruction 1. It's not in any particular order. Court instruction number 1, number 3. Number 2. Defendants 2. S-9. D-5. D-7. S-8. D-10. D-9, S-1, S-2. S-6. Court's instruction 4 and court's instruction 5. Is that what everybody's record reflects.

BY MR. LOTT: Did one of those contain the form of the verdict.

BY THE COURT: S-6. And I believe y'all wanted 45 minutes each. You are going to evenly divide. You wanted two minute warning for the

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IN THE SUPREME COURT FOR THE
STATE OF MISSISSIPPI

No. 2001-DP-1104-SCT

MARLON LATODD HOWELL
Appellant,

vs.

STATE OF MISSISSIPPI
Appellee.

APPEAL FROM THE CIRCUIT COURT OF
UNION COUNTY, MISSISSIPPI

BRIEF OF APPELLANT, MARLON LATODD HOWELL

ORAL ARGUMENT REQUESTED

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Mississippi State Bar No. 1431

* * * *

XIV. THE COURT ERRED IN ALLOWING STATE INSTRUCTION S-6 WHICH DID NOT INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF SIMPLE MURDER AND MANSLAUGHTER AND THE COURT ERRED IN FAILING TO GRANT DEFENDANT'S INSTRUCTION D-13 AND D-18 ON THE CRIME OF SIMPLE MURDER AND MANSLAUGHTER.

The Court in failing to give defendant's Instruction D-13 (R.E. 98-99) and Instruction D-18 (R.E. 100-101), and allowing State's instruction S-6 (R.E. 102) all of which failed to give the defendant an instruction on the offense of simple murder or manslaughter is the crux of Issue No. XIV. This Court in *Conner v. State*, 632 So.2nd 1239 (Miss. 1993) discusses when lesser included offense instructions should be granted. The Court noted:

> Lesser included offense instructions should be granted unless the trial judge and ultimately the Court can say, taking the evidence in the light most favorable to the accused and considering all the reasonable inferences which may be drawn in favor of the accused from the evidence that a reasonable jury could find the defendant guilty of a lesser included offense.

This Court in *Harveston v. State*, 493 So.2nd 365, 373 (Miss. 1986) held that giving a lesser included instruction was appropriate where the jury could have and did find that *Harveston* did not commit the murder in the course of a robbery. Although in *Edwards v. State*, 737 So.2nd 275, 311, (Miss. 1999) this Court found that a lesser included instruction was not warranted, that decision was based upon no evidence indicating that the victim was killed in any context but an armed robbery. As previously mentioned in assignment of error No. XII, the record is void of any testimony from co-defendants, Ray and Lispey, that when Pernell's vehicle was stopped Howell intended to rob him or made any

reference of a desire to rob Pernell. In fact, the only evidence of Howell's desire to stop Pernell was that he knew him. Also, the proof is undisputed that Howell did not approach Pernell's vehicle with a gun drawn nor did he have a gun drawn while he talked with Pernell as observed by eyewitness, Rice. It was not until Howell jumped back from Pernell's car, threw his hands up in the air, and then came down and pulled a gun from his waistband and shot Pernell did Rice even realize anything was unusual or suspicious about what he was observing in front of his house. The testimony from co-defendant, Lipsey, indicated that when Howell came back to the car he stated Pernell had sprayed him with mace and that he then shot him. The record is void of any statements from Howell to Ray or Lipsey to stop Pernell's car because he was going to rob him or any statements from Howell after the incident that he intended to rob Pernell. When this evidence is taken in "the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence." The jury could have found and returned the lesser included offense of simple murder or manslaughter. The fact remains that if this jury had believed Howell approached Pernell's vehicle to sell him drugs and was sprayed in the face with mace by Pernell in reaction, then they could have returned a conviction on manslaughter. The Court's failure to instruct the jury on the lesser included offense of simple murder and manslaughter was error. The jury as instructed had not choice but either to turn Howell loose or convict him of Capital Murder, with the former being an unacceptable choice in Union County for this crime.

XV. THE COURT ERRED IN REFUSING TO GRANT HOWELL'S INSTRUCTION D-3 ON WEIGHT OF THE EVIDENCE INSTRUCTION, IN

* * * *

(2)

No. 03-9560

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

MARLON HOWELL,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

On Writ of Certiorari to the Supreme Court of Mississippi

BRIEF FOR MARLON HOWELL, PETITIONER

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QUESTIONS PRESENTED

1. Can a state court, consistent with the Eighth and Fourteenth Amendments to the Constitution of the United States, refuse to instruct a jury in a death penalty case on at least one lesser included offense that is recognized in state law and supported by the evidence?

2. Was petitioner's federal constitutional claim properly raised before the Mississippi Supreme Court for purposes of 28 U.S.C. § 1257?

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IN THE

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No. 03-9560

MARLON HOWELL,

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STATE OF MISSISSIPPI,

Respondent.

On Writ of Certiorari to the Supreme Court of Mississippi

BRIEF FOR MARLON HOWELL, PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported at *Howell v. State*, 860 So.2d 704 (Miss. 2003).

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on October 23, 2003, and rehearing denied on December 18, 2003. The petition for a writ of certiorari was filed on March 17, 2004, and granted on June 28, 2004. The jurisdiction of the Supreme Court is invoked under 28 U.S.C.

§ 1257 on the ground that a right or privilege of the defendant which is claimed under the Constitution of the United States has been denied by the State of Mississippi.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provisions of the United States Constitution: The Eighth Amendment to the Constitution of the United States, which provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States which provides, in pertinent part, that:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Marlon Howell was indicted for capital murder, defined as a killing during the commission of an attempted robbery, by a Union County, Mississippi, Grand Jury. *Howell*, 860 So.2d 704. He was tried and convicted of capital murder and sentenced to death by a Union County jury. During the course of the trial Howell presented alternative defenses. He offered the absolute defense of alibi but also vigorously fought the alleged underlying felony of attempted robbery. If the jury concluded that the evidence of attempted robbery was not established beyond a reasonable doubt, it could not find Howell guilty of capital murder. *Id.* at 742-43, ¶ 136.

The state's case for robbery was undermined by two of its own witnesses. First, a co-defendant-turned-state's-witness testified that the shooting was done by Howell but it resulted from Mr. Pernell first spraying Howell in the face with mace. *Id.* at 714, ¶ 11. Further, the shooting was observed by a

disinterested witness, Charles Rice. Mr. Rice testified that he observed a conversation and that there were no indications of a robbery taking place. *Id.* at 713, 743, ¶¶ 3, 136.

Rice testified that he was in his Broad Street home on the morning of May 15, 2000, when he heard a horn blowing outside and looked out the window. (T. 548) The window he looked through was approximately 20-25 feet from the road. (T. 549) He saw two vehicles that were two to three feet apart. A man got out of the passenger's side of the rear vehicle and walked between the two cars up to the driver's side of the front one. (T. 550)

The person who approached Pernell's car was having some type of conversation with him. (T. 554) Mr. Rice observed the subject bent over looking into the vehicle, talking to the driver. (T. 581) The subject then jerked his hands up in the air, pulling away from the vehicle, and then brought his hands down, pulled out a pistol and shot Pernell. (T. 554) Rice was clear that when the individual got out of the car and later raised up and threw his hands in the air, he did not have a gun in his hand or gloves on. (T. 581)

After the shooting, the suspect jumped back, the rear vehicle backed up into the road and the subject got into the passenger's side front seat and the vehicle took off. (T. 555) Rice testified he did not see anything occur between the time the shooter got out of the car and the shooting took place to indicate to him that a robbery was being committed; nor did he see anything occur afterwards that suggested a robbery. (T. 601) In his 911 call, Rice indicated he saw a shooting, not a robbery. (T. 602)

Brandon Shaw testified that on the evening of May 14 he and his girlfriend Keisha went over to Oliver Jones' house and stayed until 10:00 or 10:30 p.m. (T. 629) Adam Ray and Curtis Lipsey were at Jones' house but later all went to Shaw's house. (T. 630) Shaw, Ray and Lipsey left to ride

around where they saw Marlon Howell and picked him up. (T. 630-631) They switched to Adam Ray's grandmother's car (T. 633) and went to the Chevron station near the Highway Patrol office at around 11:30 p.m. for gas. (T. 634) Shaw stated when Howell got into the car with them he explained he needed money to pay his probation officer. (T. 634)

The four of them drove to Tupelo. After driving around town they went by a gas station and saw a man out front. Marlon Howell made a statement "there goes an easy lick." (T. 638) Shaw testified they stopped in Tupelo to get gas (T. 639) and then went back to New Albany. (T. 639) After they got back to New Albany, they went to Shaw's house and sat around for a few hours and talked. (T. 640) Shaw testified that while in New Albany, Marlon Howell never said anything about robbing anybody; nor after Howell, Ray and Lipsey returned from Tupelo did he ever mention robbing anyone. (T. 679)

Curtis Lipsey testified he was with Marlon Howell when Howell shot Pernell on the morning of May 15, 2000. (T. 704) Lipsey testified that on the evening of May 14th he was with Bernard Shaw and Adam Ray when they picked up Marlon Howell who indicated he needed money to pay his probation officer. (T. 705) Lipsey indicated he, Ray, Shaw and Howell went to Tupelo. While in Tupelo they drove by a convenience store and saw a man standing outside on the phone. Howell asked Shaw to stop his car and made a statement that the man at the pay phone would be a "good little lick." (T. 707-708)

Lipsey testified that after they returned to New Albany, a car drove by and Howell reached over and blinked the car lights on and off trying to stop the car. Adam Ray got back in the car and they pulled behind the car and it stopped. Howell got out, went to the man's car, jumped back, pulled a gun out and shot the man. (T. 708-709)

Lipsey testified that when Howell came back to the car after the shooting, Howell stated he shot the man because he had sprayed him in the face with mace. (T. 713) Lipsey testified Howell did not have a gun in his hand when he got out of the car and went to Pernell's car. (T. 734)

Marcus Powell testified that he knew Curtis Lipsey, Adam Ray, Brandon Shaw and Marlon Howell. (T. 750) On May 14, 2000, about 8:00 p.m. he went to Brandon Shaw's house in New Albany. (T. 751) Adam Ray, Brandon Shaw, Marlon Howell and Curtis Lipsey were also at Shaw's house. (T. 752) Powell testified Marlon Howell told him he needed to pay his probation officer or he was going to be locked up. (T. 753) Powell stated Shaw, Howell, Ray, and Lipsey left Shaw's home around 11:00 p.m. (T. 754)

Powell testified that before they left, Marlon Howell stated he was going to make a sting. (T. 755) Powell explained that saying to "sting" someone could mean to borrow money or get money from someone who owed you, and that Howell never said he was going to rob anyone. (T. 772)

The evidence is undisputed that the person who approached Pernell's car did not have a gun drawn; nor during his brief conversation with Pernell did he draw a gun. (T. 581, 734) It was not until the assailant jumped back from Pernell's car and raised his hands in the air that he then pulled a gun and fired. (T. 554-55, 708-09) Lipsey testified that when Howell came back to the vehicle occupied by Ray and Lipsey, Howell indicated that Pernell had sprayed him with mace and so he shot Pernell. (T. 713)

Based on these facts, Howell sought a jury instruction on "simple" murder and manslaughter. [J.A. 17-20] The trial court denied these instructions. Howell raised this issue on appeal to the state supreme court but was denied relief. *Id.* at 741-44.

SUMMARY OF THE ARGUMENT

The death sentence in this cause is plainly unconstitutional in that the jury was given only two options—guilt of capital murder or acquittal. Howell properly requested a lesser offense instruction supported by the facts of this case and permitted under state law. The State of Mississippi objected and the trial court denied the tendered instruction.

Howell adequately preserved his claim of entitlement to such an instruction as a matter of federal constitutional law as well as Mississippi law. The state supreme court's established rule for reviewing allegations of improper denial of lesser offense instructions in death penalty cases explicitly incorporates the federal constitutional rights recognized by this Court in *Beck v. Alabama*.

It is commonly understood among the bench and bar in Mississippi that state law and the federal constitution occupy the same ground in considering lesser offense instructions in death penalty cases. Where, as here, the federal constitutional right and the state law right occupy the same ground, the state court's rejection of the claim on one basis implicitly rejects the claim on both.

ARGUMENT

I. IN AFFIRMING THE TRIAL COURT'S DENIAL OF A REQUESTED LESSER INCLUDED OFFENSE INSTRUCTION THE MISSISSIPPI SUPREME COURT IGNORED TWENTY-FIVE YEARS OF CASELAW FROM THIS COURT, THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND ITS OWN DECISIONS, RESULTING IN A VIOLATION OF MARLON HOWELL'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Marlon Howell requested his jury be instructed on the lesser included offenses of murder and manslaughter. *Howell v. State*, 860 So.2d at 741-44, ¶ 131-40. The trial court refused those instructions and his case was submitted to the jury with two options—guilty of capital murder or not guilty of any offense. *Id.* Howell argued in the trial court and on appeal to the Mississippi Supreme Court that he was vigorously fighting the evidence of robbery—the underlying felony elevating the case from murder to capital murder and thus subjecting him to the possibility of a death sentence. *Id.* at ¶ 136.

The trial testimony supported Howell's request. Charles Rice, called by the State of Mississippi, testified that the person who approached Pernell's car was having some type of conversation with Pernell. (T. 554) The subject then jerked his hands up in the air, pulling away from the vehicle, and only then brought his hands down, pulled out a pistol and shot Pernell. (T. 554)

Rice was clear that when the individual got out of the car and later raised up and threw his hands in the air, he did not have a gun in his hand or gloves on. (T. 581) Rice stated he did not see anything occur between the time the shooter got out of the car and the shooting took place to indicate to him

that a robbery was being committed; nor did he see anything occur afterwards suggestive of a robbery. (T. 601)

Curtis Lipsey testified he was with Marlon Howell on the date Howell shot Pernell. (T. 704) Lipsey testified that when Howell came back to the car after the shooting, Howell stated that he shot the man after the man had sprayed him in the face with mace. (T. 713) Lipsey testified that Howell did not have a gun in his hand when he got out of the car and went to Pernell's car. (T. 734)

Marcus Powell testified that before Lipsey, Ray and Howell left Shaw's house, Marlon Howell stated he was going to make a sting. (T. 755) Powell testified that saying to "sting" someone could mean to borrow money or get money from someone who owed you, and that Howell never intimated that he was going to rob anyone. (T. 772)

The proof is undisputed that the person who approached Pernell's car did not have a gun drawn; nor during his brief conversation with Pernell did he draw a gun. (T. 581, 734) It was not until the assailant jumped back from Pernell's car and raised his hands in the air, that he then pulled a gun and fired. (T. 554-55, 708-09) Lipsey testified that when Howell came back to the vehicle occupied by Ray and Lipsey, Howell indicated that he shot Pernell because he had sprayed him with mace. (T. 713)

When this evidence is taken in "the light most favorable to the accused, and considering all reasonable favorable inferences which may be drawn in favor of the accused from the evidence," it cannot be said "that no reasonable jury could find the defendant guilty of the lesser included offense (and conversely not guilty of at least one essential element of the principal charge)." *See Harper v. State*, 478 So.2d 1017 (Miss. 1985); *Lee v. State*, 469 So.2d 1225 (Miss. 1985) (determining whether lesser included offense instruction should be granted, defendant must be given benefit of all

doubts about evidence); *see also Fairchild v. State*, 459 So.2d 793 (Miss. 1984).

The state supreme court recognized that Howell's argument, based on the facts of this case, was that:

> The jury could have found and returned the lesser-included offense of simple murder or manslaughter. The fact remains that if this jury had believed Howell approached Pernell's vehicle to sell him drugs and was sprayed in the face with mace by Pernell in reaction, then they could have returned a conviction on manslaughter.[1] The [c]ourt's failure to instruct the jury on the lesser included offense of simple murder and manslaughter was error. The jury as instructed had no choice but either to turn Howell loose or convict him of [c]apital murder . . . .

Nonetheless, the court held Howell was not entitled to a lesser included offense instruction. *Howell* at ¶ 139. In holding that Howell was not entitled to a lesser-included offense instruction of murder or manslaughter, the state court ignored the mandate of this Court and affirmed a plainly unconstitutional death sentence. *See Beck v. Alabama*, 447 U.S. 625 (1980).

Where as here the evidence in a capital murder trial could support a verdict of guilt of a non-capital offense, the defendant is entitled under the Eighth and Fourteenth Amendments to the Constitution of the United States to submit to the jury an instruction on the non-capital offense. *Beck v. Alabama*, 447 U.S. 625, 638 (1980). If the jury is not given that option, the resulting capital murder conviction upon which the death sentence rests is unreliable and the

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[1] More appropriately, a reasonable juror could have returned a verdict of guilty of murder pursuant to Miss. Code § 97-3-19 (1)(c). Under this fact scenario Howell would have been guilty of killing during the commission of a felony, i.e., attempt to sell drugs.

decision of guilt beyond a reasonable doubt uncertain. *Beck* at 642-43.

This Court's "fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all." *Schad v. Arizona*, 501 U.S. 624, 646 (1991).

The Court previously acknowledged that "[t]he absence of a lesser included offense instruction increases the risk that the jury will convict . . . simply to avoid setting the defendant free." *Spaziano v. Florida*, 468 U.S. 447 455 (1984). As the *Beck* Court noted, such a risk of unwarranted conviction cannot be tolerated in a case in which the defendant's life is at stake. *Beck*, 447 U.S. at 637.

The goal of *Beck* was to "eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." *Schad*, 501 U.S. at 646. The *Beck* Court recognized that the issue of lesser included offenses has a direct impact on the reliability of the guilt determination in capital cases. *Schad*, 501 U.S. at 646.

The Fifth Circuit has held that *Beck* is violated where the trial judge erroneously fails to give a lesser offense instruction. *Cordova v. Lynaugh*, 838 F.2d 764, 767 (5th Cir. 1988), *cert. denied*, 108 S. Ct. 2832 (1988). Under the Eighth Amendment to the Constitution of the United States, "a lesser included offense instruction should be given if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser included offense and acquit him of the greater." *Id.* at 767. "*Beck* stands for the proposition that 'the jury [in a capital case] must be permitted to consider a verdict of guilt of a noncapital offense 'in every case' in which 'the evidence would have supported such a verdict.'" *Cordova*, 838 F.2d at 767.

The question then becomes, as a matter of state law is "murder" a lesser-included offense of "capital murder." The Mississippi Supreme Court definitively answered that question in *Watts v. State*, 717 So.2d 314 (Miss. 1998). In *Watts* the State of Mississippi argued and the trial court held that "simple murder is a lesser included offense of capital murder." *Watts* at ¶ 11. In evaluating this claim the state supreme court held:

> ¶ 12. In support of his argument, Watts cites to two Fifth Circuit Court of Appeals' cases, *Jones v. Thigpen*, 741 F.2d 805 (5th Cir. 1984), 475 U.S. 1003, 106 S.Ct. 1172, 89 L.Ed.2d 292 (1986) and *Bell v. Watkins*, 692 F.2d 999 (5th Cir. 1982), for the theory that "'[i]n Mississippi, no murder committed during the course of a robbery can be a simple murder.'" *Jones v. Thigpen*, 741 F.2d 805, 816 (5th Cir. 1984) (quoting *Bell v. Watkins*, 692 F.2d 999, 1004-05 (5th Cir. 1982)), *vacated on other grounds*, 475 U.S. 1003 (1986). Both *Jones* and *Bell* involved situations in which the trial court refused to give a lesser offense instruction where the defendant was charged with capital murder while engaged in the commission of robbery. *Jones*, 741 F.2d at 815-16; *Bell*, 692 F.2d at 1004-05. In *Jones*, the Fifth Circuit held that the trial court did not commit error by refusing to give a lesser included offense instruction of simple murder where no lesser included offense was provided by state law for murder committed during the commission of a robbery. *Jones*, 741 F.2d at 816. In *Bell*, the Fifth Circuit, stating that under Mississippi law "no murder committed during the course of a robbery can be simple murder," similarly held that the trial court's refusal to give a lesser included offense instruction was proper where there was no evidence to support the lesser charge. *Bell*, 692 F.2d at 1005.
>
> ¶ 13.This Court, however, in *Fairchild v. State*, 459 So. 2d 793 (Miss. 1984), held that this theory was flawed

because it presupposed that the defendant was guilty of robbery. *Fairchild v. State*, 459 So. 2d 793, 800 (Miss. 1984). The *Fairchild* Court stated:

> The theory is flawed. It determines what instruction will be granted at the request of the capital murder defendant on the basis of a presumption that he has already been found guilty of the underlying felony. The theory forgets that there is no such thing as a directed verdict of guilty in a criminal case, either on the principal charge in general or on any of its components. Its logic requires the determination that the proof offered by the State where not substantially contradicted must perforce be believed by the jury and so acted upon in their verdict. True, the evidence that Fairchild participated in a robbery in this case is substantial. What the trial judge has done, however—following the theory advanced by the Fifth Circuit—has been to find as a matter of law that Fairchild is guilty of robbery *before the case is ever submitted to the jury*. This constitutionally he has no authority to do.

Fairchild, 459 So.2d at 800. Based on this logic, this Court held that it was error, although not reversible error because Fairchild received the same sentence that he would have received for a conviction of simple murder, for the trial court to refuse to grant a lesser included offense instruction on simple murder. *Id.* at 801. Thus, Watts' reliance on *Jones* and *Bell* is unfounded where this Court has held that a simple murder instruction may be given on a charge of capital murder. In addition, this Court has stated that "[b]y its form, [Miss. Code Ann. § 97-3-19] implicitly recognizes the established doctrine that simple murder is a lesser included offense of capital murder." *Wheeler v. State*, 536 So.2d 1341, 1344 (Miss. 1988).

Watts at 319 (emphasis original).

Without question, as a matter of state law, murder is a lesser included offense of capital murder.[2] Accordingly, the denial of the requested lesser-included offense instruction for which Mr. Howell could have been found guilty as a matter of state law violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

II. MARLON HOWELL PROPERLY RAISED HIS FEDERAL CONSTITUTIONAL CLAIM IN THE MISSISSIPPI SUPREME COURT PURSUANT TO THAT COURT'S RULES OF PRACTICE AND PROCEDURE.

Petitioner adequately presented his federal constitutional claim to the Mississippi Supreme Court. There are two distinct bases for this conclusion. First, the Mississippi Rule on considering lesser offense instructions in death penalty cases has an intrinsic federal constitutional basis. In *Fairchild v. State*, 459 So.2d 793, 800 (Miss. 1984), the Mississippi Supreme Court held that

> [w]here the state seeks imposition of the penalty of death, the rule [of granting lesser offense instructions] takes on constitutional proportions. *Beck v. Alabama*, 447 U.S. 625, 632-33, 100 S.Ct. 2382, 2387, 65 L.Ed.2d 392, 400 (1980); *Hopper v. Evans*, 456 U.S. 605, 611-12,102 S.Ct. 2049, 2053, 72 L.Ed.2d 367, 373 (1982); *Jackson v. State*, 337 So.2d 1242, 1254-1255 (Miss. 1976).

On appeal to the Mississippi Supreme Court, Howell relied primarily on *Haverston v. State*, 493 So.2d 365, 374-75 (Miss. 1986). [J.A. 39] The State of Mississippi in response relied primarily on *Randall v. State*, 716 So.2d 584, 591 (Miss. 1998). [Brief of Appellee at 76]. Each of these cases

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[2] *See also* Miss. Code § 99-17-20 providing in death eligible cases for instruction on *any* non-death eligible offense.

derives its authority from *Fairchild*. Thus both Howell and the State of Mississippi were operating on the notion that the rule they were seeking to have applied was based on the federal constitutional due process clause as interpreted by *Beck v. Alabama*.

Howell submitted proposed jury instructions on two lesser offense charges. [J.A. 17-20] At the instruction conference Howell argued extensively the evidentiary basis for the instructions and sought the instructions explicitly to avoid placing the jury in the untenable position of convicting him of capital murder or cutting him loose, [J.A. 33, 40], this argument being this Court's primary rationale supporting *Beck v. Alabama*. The trial court denied those instructions on evidentiary grounds. [J.A. 33]

Thus Howell presented himself to the Supreme Court of Mississippi in the identical position as Roger Fairchild. The Mississippi Supreme Court in addressing Fairchild's claim, stated:

> Fairchild finally charges that the trial judge committed error when he refused to charge the jury regarding two lesser-included offenses, murder and manslaughter.
>
> The record reflects that Fairchild's attorneys requested Instruction No. D-24 which would have submitted the lesser-included offense of murder and Instruction No. D-25 which would have submitted the lesser-included offense of manslaughter. Each of these instructions was refused by the trial judge on the grounds that there was not a sufficient evidentiary basis in the record for granting either.
>
> Our law is well-settled that jury instructions are not given unless there is an evidentiary basis in the record for such. *Colburn v. State*, 431 So.2d 1111, 1114 (Miss.1983); *Johnson v. State*, 416 So.2d 383, 388 (Miss.1982). Where under the evidence a reasonable jury could find the defendant not guilty of the principal

> charge made in the indictment but guilty of a lesser included offense, the trial judge ordinarily should instruct the jury regarding the elements of that lesser-included offense. *Knowles v. State*, 410 So.2d 380, 382 (Miss.1982). *Ruffin v. State*, 444 So.2d 839, 840 (Miss.1984), expressly declares that, only where the evidence could *only* justify a conviction of the principal charge should a lesser included offense instruction be refused.
>
> This rule is wholly applicable in prosecutions brought under this state's capital murder statute. *Lanier v. State*, 450 So.2d 69, 79-81 (Miss.1984); *see also, Hill v. State*, 432 So.2d 427, 440-441 (Miss.1983); *Johnson v. State*, 416 So.2d 383, 387-388 (Miss.1982); *In Re Jordan*, 390 So.2d 584, 585-86 (Miss.1980); *Spencer v. State*, 348 So.2d 1030, 1030 (Miss.1977). Where the state seeks imposition of the penalty of death, the rule takes on constitutional proportions. *Beck v. Alabama*, 447 U.S. 625, 632-33, 100 S.Ct. 2382, 2387, 65 L.Ed.2d 392, 400 (1980); *Hopper v. Evans*, 456 U.S. 605, 611-12, 102 S.Ct. 2049, 2053, 72 L.Ed.2d 367, 373 (1982); *Jackson v. State*, 337 So.2d 1242, 1254-1255 (Miss.1976).

Fairchild, 459 So.2d at 799-800. (emphasis added).

Clearly, Howell properly presented his claim to the trial court under Mississippi law. *Duplantis v. State*, 708 So.2d 1327, 1339-40 (1998) (tendering instruction sufficient to preserve error in denial of same because "[t]his in and of itself affords counsel opposite fair notice of the party's position and the Court an opportunity to pass upon the matter"); *Fairchild*, 459 So.2d at 800.

Second, this Court's decisions support petitioner's position. In *Beck v. Alabama*, 447 U.S. 625, 630-31 n. 6 (1980), the case on which Howell's constitutional claim rests, the defendant had clearly presented the claim regarding the granting of a lesser offense jury instruction to the lower state courts but did not develop the issue in his final brief on the

merits to the Alabama Supreme Court. The state supreme court affirmed the conviction stating that the defendant had raised only one claim which related to state law. This Court accepted jurisdiction of this "plainly unconstitutional" imposition of the death penalty.[3]

Last term this Court "granted certiorari to determine whether the Ninth Circuit [had] correctly interpreted the 'fair presentation' requirement" in a case brought under 28 U.S.C. § 2254. *Baldwin v. Reese*, __U.S.__, 124 S.Ct. 1347, 1350 (2004). This Court concluded that the Ninth Circuit was wrong when it held the petitioner had met the "fair presentation" standard where the Oregon Supreme Court would have or should have realized Reese's claim rested upon federal law by reading the opinion of the lower state trial court. *Id.*

This Court flatly rejected imposing a requirement that state courts read their own lower court opinions. This Court was concerned with altering the ordinary review practices of state courts and the "serious burden" such an "opinion-reading" requirement would impose on state appellate courts. *Id.* at 1350-51.

The case *sub judice* is readily distinguishable. The Mississippi Supreme Court was not required to read beyond a brief to find material that fairly presents the federal claim.

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[3] *See also Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988) ("A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights, but in this case the authority cited by petitioner and the manner in which the fundamental right at issue has been described and understood by the Illinois courts .nake it appropriate to conclude that the constitutional question was sufficiently well presented to the state courts to support our jurisdiction."); *Martinez v. California*, 444 U.S. 277, 282-83 n.6 (1980) (state court ruling did not expressly mention the federal constitution but it was clear from trial proceedings that defendants were relying on federal constitution).

The rule sought to be applied in this matter is a rule announced by the Supreme Court of Mississippi itself, not an opinion of a lower trial court. *See Fairchild*, 459 So.2d 793. Thus the concerns expressed in *Baldwin v. Reese* are not applicable to this case. Moreover, when reviewing death penalty cases on direct appeal as in this case, the Mississippi Supreme Court does not exercise discretionary review but rather plenary review. *See Jackson v. State*, 732 So.2d 187, 189 (Miss. 1999).

Where as here the state-law rule and the federal constitutional rule are commonly understood to coexist and to be "virtually identical" in terms, the rejection of a claim under the state-law rule is tantamount to rejecting it under the federal rule. This Court's "jurisdiction does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982); *see also Daugharty v. Gladen*, 257 F.2d 750, 758 (9th Cir. 1958) (where defendant in a state criminal proceeding contends that his confession was coerced or that perjured testimony had been knowingly used, it would be unnecessary to cite to the state court "book and verse on the federal constitution").

Similarly in *Picard v. Connor*, 404 U.S. 270, 275 (1971), this Court addressed the question of "whether, on the record and argument before it, the Massachusetts Supreme Judicial Court had a fair opportunity to consider the equal protection claim and to correct that asserted constitutional defect in respondent's conviction." *Id.* at 277. The *Picard* Court went on to say:

> Obviously there are instances in which "the ultimate question for disposition," *United States ex rel. Kemp v. Pate*, 359 F.2d 749, 751 (7th Cir. 1966), will be the same despite variations in the legal theory or factual allegations urged in its support. A ready example is a challenge to a confession predicated upon psychological as well as physical coercion. *See Sanders v. United*

> *States*, 373 U.S. 1, 16, 83 S.Ct. 1068, 1077, 10 L.Ed.2d 148 (1963). Hence, we do not imply that respondent could have raised the equal protection claim only by citing "book and verse on the federal constitution." *Daugharty v. Gladden*, 257 F.2d 750, 758 (9th Cir. 1958); *see Kirby v. Warden*, 296 F.2d 151 (4th Cir. 1961). We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts.

Id. at 277 - 278.

In *Duncan v. Henry*, 513 U.S. 364, 366 (1995), this Court suggested that if the standards prescribed by a state-law rule and a federal constitutional rule are "virtually identical," the federal claim may be preserved by invoking the state-law rule. That is to say that, at least where a rule is generally understood to have a grounding in both federal constitutional law and parallel state law–like the rule excluding involuntary confessions, or the rule precluding trial of a defendant while mentally incompetent, or the rule requiring the submission of lesser offenses in a capital case under *Beck*–and where the state standard and the federal constitutional standard are virtually identical, a reference to the rule that describes its elements in terms of those common standards suffices to preserve the federal claim even if the federal constitution is not expressly cited. Under *Fairchild* the state-law rule and the federal constitutional rule are commonly understood to coexist and to be "virtually identical" in terms; thus, the rejection of a claim under the state-law rule is tantamount to rejecting it under the federal rule.

The Mississippi Supreme Court rule applied to consideration of lesser offense instructions in death penalty cases is based on the Fourteenth Amendment to the Constitution of the United States. *Fairchild*, 459 So.2d at 800. Thus anytime the rule is invoked that court understands that the claim before it includes the federal constitutional claim and both the

State of Mississippi and capital defendants operate under the notion that the claim is premised on both state law and the federal constitution. Accordingly, Marlon Howell properly raised his federal constitutional claim concerning the proper application of *Beck v. Alabama* to the Mississippi Supreme Court and that court had an adequate opportunity to address the claim.

CONCLUSION

For the foregoing reasons, the judgment of the Mississippi Supreme Court must be reversed.

Respectfully submitted,

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SEP 13 2004

IN THE

Supreme Court of the United States

MARLON HOWELL,

Petitioner

VERSUS

STATE OF MISSISSIPPI,

Respondent

On Writ of Certiorari to the Surpeme Court of Mississippi

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. THE QUESTION PRESENTED IN THE PETITION FOR CERTIORARI WAS NEVER PRESSED OR PASSED UPON IN THE MISSISSIPPI SUPREME COURT; THEREFORE, THIS COURT IS WITHOUT JURISDICTION.

II. *BECK V. ALABAMA*, 447 U.S. 625, 638 (1980), IS WHOLLY INAPPLICABLE TO HOWELL'S CASE.

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NO. 03-9560

IN THE SUPREME COURT OF THE UNITED STATES

MARLON HOWELL,
Petitioner

versus

STATE OF MISSISSIPPI,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR RESPONDENT

This matter is before the Court on the grant of a writ of certiorari from the decision of the Supreme Court of Mississippi in the case of Marlon Howell (hereinafter "Howell"). Specifically, the Supreme Court of Mississippi has affirmed the conviction of capital murder and sentence of death imposed upon Howell by the Circuit Court of Union County, Mississippi, and Howell seeks relief from that judgment. The Respondent, State of Mississippi (hereinafter "the State"), respectfully submits that this Court is without jurisdiction to hear the question presented by Howell and, additionally, that Howell is not entitled to any relief, whatsoever, from this honorable Court.

OPINION BELOW

The lower court's affirmance of Howell's conviction and sentence is reported at *Howell v. State*, 860 So. 2d 704 (Miss. 2003), and is Exhibit A to the petition for certiorari.

JURISDICTION

The order granting the writ of certiorari in this case instructed as follows, "In addition to the Question presented by the petition, the parties are directed to brief and argue the following Question: 'Was petitioner's federal constitutional claim properly raised before the Mississippi Supreme Court for purposes of 28 U.S.C. Sec. 1257?'" Pursuant to that order and to Rule 18.12 of this Court, the State addresses the question of jurisdiction "at the outset" of its brief as question I, *infra*. *See* U.S. Sup. Ct. Rule 18.12. As is fully explicated below, the claim raised in the petition was never presented to or decided by the Mississippi Supreme Court. Therefore, and with respect, this Court is without jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Howell seeks to invoke the Eighth and Fourteenth Amendments to the Constitution of the United States. He fails to do so.

STATEMENT OF THE CASE

This case arises from the May 15, 2000, capital murder of Hugh David Pernell, a retired postal worker who was delivering newspapers on a residential street in New Albany, Mississippi, in the early morning hours of that tragic day. Shortly after 5:00 a.m., Howell (who was in a vehicle with his friends/co-indictees Adam Ray and Curtis Lipsey) flagged down Pernell's vehicle. Howell approached and then reached in the driver's window of Pernell's car and struggled with Pernell. Howell then drew his Saturday Night Special from the waistband of his pants and shot Pernell in the heart. Pernell's foot hit the gas pedal, and his vehicle sped into a parked car in a nearby driveway. Howell, Lipsey, and Ray fled the scene.

The capital murder occurred in front of the home of Charles Rice, who was watching television in his living room as he prepared for work. Rice, prompted by the sound of a horn honking, went to his window. From this vantage point, he witnessed the entire crime. The next day, Rice viewed a lineup and unequivocally identified Howell as the killer.

The motive for the crime was undisputedly robbery. Howell owed supervision and other fees to his probation officer. Howell had received notification that he would be jailed, unless he made payment that very day – May 15, 2000. Howell told his friends that he "needed to make a sting," and he was looking for "an easy lick." Otherwise, he would be "locked up."

Howell and his friends had driven around most of the night, while Howell looked for "an easy lick." By 5:00 a.m., when Howell saw Pernell's vehicle, Howell, apparently, thought he had found one. However, when Pernell sped away from the scene, Howell's plans were foiled (a fact which is demonstrated by the bag of coins that was scattered in the floorboard of Pernell's car).

Thereafter, Howell, Lipsey, and Ray went to the home of their friend, Brandon Shaw. Lipsey and Ray told Shaw that Howell "shot somebody." Howell asked Shaw to take him home immediately. Howell hid the murder weapon behind Shaw's house, and Shaw took Howell home to Blue Mountain, Mississippi. Howell – known by his cohorts as "Chiefa" – ordered all those involved not to tell anyone.

Contrary to Howell's direction, his friends confessed to the authorities the very next day. When Howell was subsequently questioned by the police, he claimed to have been in Corinth, Mississippi, with a woman all night. However, at trial, Howell's family testified that he was at home in Blue Mountain at the time of the crime.[1]

Howell, Lipsey and Ray were indicted June 29, 2000, for capital murder. In March, 2001, Howell was tried before the Circuit Court of Union County, Mississippi. At the conclusion

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[1]The facts of this case, as found by the Mississippi Supreme Court, appear in greater detail in paragraphs two through nineteen of the opinion below. *See Howell*, 860 So. 2d at 712-15.

of the guilt phase of the trial, Howell requested instruction D-18, which was a combination of the State's withdrawn instruction on premeditated murder (S-3) and the defendant's proposed instruction on culpable-negligence manslaughter (D-13).[2] This request was denied. The jury convicted Howell of capital murder and, after a separate sentencing hearing, found that Howell should suffer death.

Howell then filed his automatic appeal in the Supreme Court of Mississippi, in which he raised twenty-seven issues for consideration.[3] Only two of those issues are pertinent to the claims raised in this Court.

Of primary significance is the assertion of error raised by Howell in claim number XIV before the Mississippi Supreme Court, namely:

> THE COURT ERRED IN ALLOWING STATE INSTRUCTION S-6 WHICH DID NOT INSTRUCT THE JURY ON THE LESSER

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[2]Howell abandoned the depraved-heart murder instruction that was in his proposed D-13 for the State's withdrawn instruction on premeditated murder, which defense counsel stated to be "the better instruction on the simple murder." J.A. at 17-20, 32. The premeditated murder instruction and the culpable-negligence manslaughter instruction were combined in proposed instruction D-18, which was refused. J.A. at 17-20, 36.

[3]In addition, the Mississippi Supreme Court, pursuant to state statute, considered, sua sponte, the following issue: "Whether the imposition of the death penalty is excessive or disproportionate in this case." *Howell*, 860 So. 2d at 717, 764-65.

INCLUDED OFFENSE OF SIMPLE MURDER AND MANSLAUGHTER AND THE COURT ERRED IN FAILING TO GRANT DEFENDANT'S INSTRUCTION D-13 AND D-18 ON THE CRIME OF SIMPLE MURDER AND MANSLAUGHTER.

J.A. at 39. The relevant portion of Howell's state-court brief is before this Court as pages 38-40 of the Joint Appendix. In that brief, Howell never purported to raise a federal claim. He never used the term "federal" or cited the Constitution of the United States. He never cited any federal authority at all – much less the seminal case upon which his current claim before this Court is based (*i.e., Beck v. Alabama*, 447 U.S. 625 (1980)).

Rather, Howell alleged that there was evidence to support his proposed manslaughter and murder instructions, and, under Mississippi law, he was, therefore, entitled to these instructions. In support of this claim, Howell cited only three cases, all of which were Mississippi decisions: (1) *Conner v. State*, 632 So. 2d 1239 (Miss. 1993), for the standard of reviewing the denial of instructions under Mississippi law; (2) *Harveston v. State*, 493 So. 2d 365, 373 (Miss. 1986), for the proposition that a murder instruction is appropriate in Mississippi where the jury could have found that the defendant did not commit the murder in the course of a robbery; and, (3) *Edwards v. State*, 737 So. 2d 275 (Miss. 1999), for the purpose of attempting to distinguish Howell's case from a case where the Mississippi Supreme Court had held that a murder

instruction was unwarranted when the evidence indicated that the victim was killed only in the context of a robbery. J.A. at 39.

The Supreme Court of Mississippi addressed the denial of the manslaughter and murder instructions and concluded that Howell's claim was "contradicted by the evi ence in the record. The facts of this case clearly do not support or warrant such instructions." *Howell*, 860 So. 2d at 744. The lower court's opinion cited two cases on this issue: *Presley v. State*, 321 So. 2d 309, 310 (Miss. 1975) and *Grace v. State*, 375 So. 2d 419, 420 (Miss. 1979). Both of these Mississippi cases were decided prior to *Beck v. Alabama, supra.*

In addition, one other issue from the lower court is relevant to the instant proceedings. Specifically, to the extent Howell claims that there was no evidence to support the underlying felony of robbery[4], it is noteworthy that the

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[4]In Mississippi, the underlying crime of armed robbery, upon which Howell's jury was instructed, includes the attempt to rob. *See* Miss. Code Ann. § 97-3-79 ("Every person who shall feloniously take **or attempt to take** from the person or from the presence the personal property of another and against his will by violence to his person or by putting such person in fear of immediate injury to his person by the exhibition of a deadly weapon shall be guilty of robbery. . .") (emphasis added). Furthermore, the crime of capital murder is also defined as killing during the course of an attempted robbery. *See* Miss. Code Ann. § 97-3-19 (2)(e) ("The killing of a human being without the authority of law by any means or in any manner . . . . When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary,

Mississippi Supreme Court held to the contrary. That is, Howell claimed in issue XII of his state-court brief that the evidence of the underlying felony of robbery was legally insufficient to support Howell's capital murder conviction. S.C.R.[5] Appellant's Brief at 98-99. The Mississippi Supreme Court squarely rejected this claim and held: "There is no doubt that there is **ample** evidence in the record that a reasonable person could infer Howell's intent to rob Pernell." *Howell*, 860 So. 2d at 739 (emphasis added).

Furthermore, the Supreme Court of Mississippi denied relief on the remainder of Howell's claims and affirmed his conviction and sentence October 23, 2003. From this affirmance, Howell brings the instant petition in this Court.

SUMMARY OF THE ARGUMENT

The question raised in Howell's petition was never presented to or considered by the Mississippi Supreme Court. For this reason, this Court is, respectfully, without jurisdiction, and the petition for writ of certiorari should be dismissed. Alternatively, Howell's claim is without merit. That is, *Beck v. Alabama*, 447 U.S. 625 (1980), has no application to the instant case. If the evidence had warranted the instructions Howell proposed, there is nothing in Mississippi's law that would have prevented Howell from receiving them. However, the Mississippi Supreme Court found that there were no facts in this record that would have warranted the instructions on murder and manslaughter that Howell urged at trial. Therefore, Howell's claims to the contrary should be dismissed.

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kidnapping, arson, **robbery**, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, **or in any attempt to commit such felonies.**") (emphasis added).

[5]The direct appeal record in the Mississippi Supreme Court will be designated as "S.C.R." for state-court record.

ARGUMENT

I. THE QUESTION PRESENTED IN THE PETITION FOR CERTIORARI WAS NEVER PRESSED OR PASSED UPON IN THE MISSISSIPPI SUPREME COURT; THEREFORE, THIS COURT IS WITHOUT JURISDICTION.

Howell asks the Court to review a federal constitutional claim that was never presented to or decided by the state court below. Therefore, this Court lacks jurisdiction, according to 28 U.S.C. Section 1257 and the firmly established case law.

Specifically, Howell now claims that he was entitled to instructions on manslaughter and murder, based upon the Eighth and Fourteenth Amendments to the Constitution of the Untied States as well as the Court's decision in *Beck v. Alabama*, 447 U.S. 625 (1980) (hereinafter "the *Beck* claim"). As was detailed more fully in the foregoing statement of the case, Howell never raised in the lower court any federal claim regarding the denial

of the manslaughter and murder instructions at issue. Rather, the question before the Mississippi Supreme Court was whether, under state law, the evidence supported these proposed instructions.

Nonetheless, Howell now asserts two inapposite theories as to how the Court might have jurisdiction of the *Beck* claim. First, Howell alleged in his petition that he "raised this issue on appeal" below, but the Mississippi Supreme Court's opinion and the authority contained therein did not "address the federal constitution." *See* Petition for Certiorari at 3. Then, after this Court's instruction to address the question of jurisdiction, Howell now contends that federal and state law are "virtually identical" on this issue. *See* Brief for Petitioner at 17, 18. According to Howell, therefore, the Mississippi Supreme Court understood "that the claim before it include[d] the federal constitutional claim and both the State of Mississippi and capital defendants operate[d] under the notion that the claim [was] premised on both state law and the federal constitution." *See* Brief for Petitioner at 18-19.

The latter theory is inconsistent with that which was initially raised in Howell's petition.[6] This inconsistency

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[6]It is unclear how the lower court could fail to address a federal claim that it simultaneously addressed by implication. Most importantly, however, it is noteworthy that Howell has completely changed his argument on this point midstream (and, upon being prompted by the Court to address jurisdiction). *See* U.S. Sup. Ct. Rule 24 (a) (noting that a merits brief "may not change the substance

demonstrates the obviously tenuous nature of Howell's assertions of jurisdiction. Indeed, as the following discussion plainly indicates, both assertions are wholly without basis in fact or law.

"It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). "It is well settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.'" *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (quoting *Webb v. Webb*, 451 U.S. 493, 496-97 (1981)).

The Court has discussed several crucial bases for this "not pressed or passed upon" rule. *See McGoldrick v. Compagnie General*, 309 U.S. 430, 435-36 (1940). The first vital concern is comity. The Court has long held that "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams v. Robertson*, 520 U.S. 83, 91 (1997) (quoting *Webb*, 451 U.S. at 500); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988).

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of the questions already presented" in the petition).

In addition, there are other important "practical considerations" that the Court has noted in connection with this rule. *Bankers Life & Casualty Co.*, 486 U.S. at 79. For example, the rule protects the Court's scarce resources by avoiding unnecessary consideration of cases where state courts resolve issues in accordance with state law. *Adams*, 520 U.S. at 90-91; *Webb*, 451 U.S. at 500. The rule assists the Court by allowing for proper development and refinement of the record, including: the pertinent facts and law; the state court's reasoning for its decision; and, the issues presented by the parties. *Adams*, 520 U.S. at 91; *Bankers Life & Casualty Co.*, 486 U.S. at 79; *Webb*, 451 U.S. at 500; *Cardinale*, 394 U.S. at 439.

Clearly, these well-settled bases for declining to consider a case such as Howell's are vitally important to the judiciary. The Court has concluded that scrupulous adherence to the "not pressed or passed upon" rule will, "promote respect for the procedures by which our decisions are rendered, as well as confidence in the stability of prior decisions." *Illinois v. Gates*, 462 U.S. 213, 224 (1983). This conclusion is equally true and applicable in the instant case.

Furthermore, in contemplating the limits of this Court's jurisdiction, it is also necessary to recognize that Howell bears the burden of proving that his case is proper for consideration. As Howell conceded in his petition, the Mississippi Supreme Court never addressed any federal constitutional claim as to the

denial of the instructions at issue. Therefore, Howell bears the burden of demonstrating to this Court that he properly raised the federal claim in the state court.

> When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.

Board of Directors of Rotary Int'l, 481 U.S. at 550 (citations and internal quotation marks omitted). Howell has not met and cannot meet this burden.

A. THIS CLAIM WAS NOT EXPLICITLY RAISED OR CONSIDERED BELOW.

Howell's first claim regarding jurisdiction is that he raised the federal constitutional question below and the Mississippi Supreme Court failed to address it. However, in his brief before the Mississippi Supreme Court, Howell neither used the word "federal" to describe his claim, nor did he cite to the federal constitution or any other federal authority. He cited only Mississippi cases. More telling, however, is the fact that Howell never cited *Beck v. Alabama*, 447 U.S. 625 (1980), which is the federal authority upon which he now relies in this Court.

In addition, as Howell conceded in his petition for certiorari, the Mississippi Supreme Court's decision does not refer to or rely upon any federal authority whatsoever. In fact,

the two Mississippi decisions cited by the lower court were both rendered prior to this Court's decision in *Beck*, *supra*. *See* Petition for Certiorari at 3.

Under these circumstances, Howell cannot legitimately contend that the *Beck* claim was pressed or passed upon in the Mississippi Supreme Court – much less make the affirmative showing this Court requires. *See Street*, 394 U.S. at 582. Howell has "done nothing to demonstrate that [he] complied with the applicable state rules for raising [his] federal due process claims before the" Mississippi Supreme Court. *See Adams*, 520 U.S. at 87.

Howell's petition does not cite a single page, paragraph, or sentence in his brief where this federal claim was supposedly raised. *See* U.S. Sup. Ct. Rule 14(g)(i) (requiring "specific references" to the places in the record where the matter in dispute appears). In fact, he cannot do so, because he never raised the *Beck* claim in the Mississippi Supreme Court.

Indeed, this Court has dismissed writs of certiorari in other cases where the state court was silent and where there existed a considerably greater factual basis upon which to argue that a federal claim had been presented. For example, in *Adams, supra*, the petitioners raised "passing invocations of 'due process'" in their state-court brief, but failed to specify whether they were relying on the federal or state constitution. *Adams*, 520 U.S. at 89, n. 3. The petitioners' brief in the state court also cited the federal case that would have supported the

federal claim, albeit in a different context. *Id.* at 88. Furthermore, out of an abundance of caution, the respondents addressed the federal question in their brief before the lower court. *Id.* In addition, the respondents failed to raise an objection to jurisdiction in their brief in opposition. *Id.* at 91-92. On those facts, this Court held that the petitioners "did not meet our minimal requirement that a *federal* claim was presented." *Id.* at 89, n.3 (emphasis in original).

Similarly, in *Webb*, *supra*, this Court dismissed a writ of certiorari for lack of jurisdiction in a case where: the petitioner used the phrase "full faith and credit" in the lower court but failed to cite to the federal constitution; the state constitution in question did not have a "full faith and credit" clause; and, the respondent did not dispute jurisdiction in the brief in opposition before this Court. On those facts, this Court concluded: "Because petitioner failed to raise her federal claim in the state proceedings and the Georgia Supreme Court failed to rule on a federal issue, we conclude that we are without jurisdiction in this case." *Webb*, 451 U.S. at 501-02.

Clearly, Petitioner Howell has done far less than unsuccessful petitioners in other cases to affirmatively show that the question presented in his petition for certiorari was presented to the state court. Howell never mentioned the phrase "due process" in his state-court brief on this issue. J.A. at 39-40. He never cited the federal constitution, a federal case, or, specifically, *Beck*, *supra*, in any context with regard to the

denial of the disputed instructions. Moreover, the State did not address any purported federal claim in its brief on this point. Additionally, the State timely raised its objections to jurisdiction in its brief in opposition before this Court. Thus, Howell presents an even less compelling case for jurisdiction than other cases in which this Court has ruled against the petitioner as to jurisdiction.

Howell erroneously claims that the *Beck* case at issue in this appeal supports his assertion of jurisdiction. Specifically, Howell alleges that, in *Beck*:

> the defendant had clearly presented the claim regarding the granting of a lesser offense jury instruction to the lower state courts but did not develop the issue in his final brief on the merits to the Alabama Supreme Court. The state supreme court affirmed the conviction stating that the defendant had raised only one claim which related to state law.

Brief for Petitioner at 15-16 (citing *Beck*, 447 U.S. at 630-31, n. 6).

To the contrary, however, Beck's "petition for certiorari to the Alabama Supreme Court . . . specifically stated that he was challenging the Alabama statute as being in violation of the Eighth, Sixth, and Fourteenth Amendments to the United States constitution. . ." *Beck, id.*[7] Therefore, Howell has obviously

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[7]The Court also noted that the Alabama Attorney General did not dispute jurisdiction, and that the Court "should not simply brush

mischaracterized this Court's discussion of jurisdiction in *Beck*, *supra*. Furthermore, even if Howell's interpretation of the facts in *Beck*, *supra*, were accurate, it would avail him of nothing – given that Howell never mentioned a federal claim or any federal authority on this issue in the trial or appellate courts of Mississippi.

Indeed, Howell has completely failed to demonstrate that his *Beck* claim was raised or considered in the lower court. He cannot make such a demonstration, given that there is absolutely nothing in the state-court record to remotely indicate that Howell raised this claim for consideration below. Similarly, any assertion that the state court remotely considered any federal claim on this point is wholly unsubstantiated by the record (as was conceded in Howell's petition before this Court). Therefore, Howell's initial claim (*i.e.*, that he presented the *Beck* claim and the Mississippi Supreme Court failed to address it) is without basis in fact or law.

B. THIS CLAIM WAS NOT IMPLICITLY RAISED OR CONSIDERED BELOW.

Howell's second and contradictory assertion of jurisdiction (raised for the first time in his brief of the merits) is that, "the Mississippi Rule on considering lesser offense

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aside the Alabama Attorney General's view of his own State's law." *Id.*

instructions in death penalty cases has an intrinsic[8] federal constitutional basis." *See* Brief for Petitioner at 13. This new claim is a completely inaccurate statement of Mississippi law for two reasons.

First, as will be discussed in further detail in issue II, *infra*, the federal law on this point is distinguishable from Mississippi law for many reasons. Of particular importance to the issue of jurisdiction is the fact that federal law only requires a lesser-included offense instruction in cases where State law recognizes the offense as such. However, the Mississippi

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[8]As Howell argues, "jurisdiction does not depend on citation to book and verse." Brief for Petitioner at 17 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 113-14, n.9 (1982)). However, the State would also point out that, jurisdiction should depend on citation to **something**. That is, in order for this Court to consider whether the state and federal claims are somehow interwoven, Howell would have to present some evidence that the federal claim is even arguably mentioned in the proceedings below. There must be some question or doubt on the pleadings. Otherwise, there would be nothing with which the state-law claim could be considered to interweave and nothing that could be considered "intrinsic" to that state-law claim. *See, generally, Michigan v. Long*, 463 U.S. 1032, 1037 (1983) (discussing this Court's procedures when the record is unclear as to whether the lower court was actually considering a federal claim, given that the lower court's opinion "referred twice to the state constitution in its opinion, but otherwise relied exclusively on federal law"). As discussed previously, there is no such lack of clarity in Howell's case; there simply was no assertion of a federal claim in the Mississippi Supreme Court. Moreover, as Howell conceded in his petition, the opinion of the lower court did not rely on federal authority.

Supreme Court is much more liberal in allowing manslaughter and/or murder instructions in capital murder cases. In addition, when faced with *Beck* claims, the Mississippi Supreme Court has consistently distinguished Mississippi law from the unconstitutional Alabama statute at issue in *Beck, supra.*

1. THE FEDERAL LAW IS NOT INTRINSIC TO THIS STATE-LAW CLAIM.

The Supreme Court of Mississippi very liberally allows instructions on manslaughter and murder in capital murder cases – regardless of whether those offenses are technically lesser-included or merely lesser offenses of capital murder. *See Mease v. State*, 539 So. 2d 1324, 1325 (Miss. 1989) (holding that, in cases where "the facts may fit two or more of the legally defined genera of homicide, the accused may of right demand that the jury be instructed of the alternatives the law affords"); *Lanier v. State*, 450 So. 2d 69, 79-80 (Miss. 1984) (reversing for failure to give a heat-of-passion manslaughter instruction in a capital murder case where the defendant was charged with killing a peace officer – even though heat-of-passion manslaughter is not technically a lesser-included offense thereof).

The lower court's rationale for liberally allowing manslaughter and murder instructions in capital murder cases is that the defendant is entitled to have the jury instructed on his theory of the case. The only requirement for granting such instructions under state law is that there must be **some** evidence

in the record to support the requested murder or manslaughter instruction. This line of Mississippi cases has been referred to as the "*Harper-Lee-Fairchild* evidentiary standard" for reviewing the denial of manslaughter and murder charges. *See Mease*, 539 So. 2d at 1334 (citing *Harper v. State*, 478 So. 2d 1017, 1021 (Miss. 1985); *Lee v. State*, 469 So. 2d 1225, 1230-31 (Miss. 1985); *Fairchild v. State*, 459 So. 2d 793, 800 (Miss. 1984)).

The basis for this line of cases appears to be the 1976 (pre-*Beck*) case of *Jackson v. State*, which is discussed *infra*, and which was the first, post-*Gregg* death penalty case in Mississippi. *See Jackson v. State*, 337 So. 2d 1242 (Miss. 1976); *Gregg v. Georgia*, 428 U.S. 198 (1976). Therefore, it is evident that the Mississippi law on this subject is considerably more expansive than and pre-dates this Court's pronouncement in *Beck*.

2. THE MISSISSIPPI SUPREME COURT HAS CONSISTENTLY DISTINGUISHED THE FEDERAL AUTHORITY FROM THE STATE LAW ON THIS ISSUE.

Nonetheless, Howell quotes dicta from the Mississippi Supreme Court's decision in *Fairchild v. State*, 459 So. 2d 793, 800 (Miss. 1984), to support his new allegation that the *Beck* claim was implicitly raised and addressed in the lower court proceedings. *See* Brief for Petitioner at 18-19. In the *Fairchild* dicta, the Mississippi Supreme Court noted in passing that the

denial of lesser-included offense instructions "takes on constitutional proportions" and cited *Beck*, *supra*. *See Fairchild*, 459 So. 2d at 800. Based on this, Howell contends that a *Beck* claim is "intrinsic" to Mississippi's law on this subject. This is inaccurate.

It is true that, when squarely faced with *Beck* claims, the Mississippi Supreme Court has noted that – to the extent *Beck* requires lesser-included offense instructions, if warranted by the evidence – *Beck* is in accord with the longstanding law in Mississippi. *See Wilson v. State*, 574 So. 2d 1324, 1336-37 (Miss. 1990) (quoting *Lanier*, 450 So. 2d at 79 and *Jackson v. State*, 337 So. 2d 1242, 1255 (Miss. 1976)); *Pinkney v. State*, 538 So. 2d 329, 353 (Miss. 1989) (vacated on other grounds in *Pinkney v. Mississippi*, 494 U.S. 1075 (1990)). However, by no stretch of the imagination has the Mississippi Supreme Court adopted a "*Beck*" rule to be used in considering the denial of murder and manslaughter instructions in capital murder cases.

Rather, when Mississippi inmates have raised *Beck* claims, the Mississippi Supreme Court has readily distinguished Mississippi's laws from the unconstitutional Alabama statute at issue in *Beck*. For example, in *Berry v. State*, the Mississippi Supreme Court held:

> Under the [Alabama] statute, the judge was specifically prohibited from giving the jury the option of convicting the defendant of a lesser included offense. . . . **This is not the case** with Berry, or **with the Mississippi statutes and**

> **case law**. The United States Supreme Court in *Beck* favorably cites *Jackson v. State*, 337 So. 2d 1242 (Miss. 1976). *Beck*, 447 U.S. at 635, 100 S.Ct. at 2388-89. 65 L.Ed. 2d at 401 n. 10. This Court in *Jackson* struck down part of Mississippi's post-*Furman* death penalty statute which contained a similar prohibition on charging lesser included offenses, while warning that lesser included offense instructions should not be given indiscriminately or automatically, but when warranted by the evidence.

Berry v. State, 575 So. 2d 1, 11-12 (Miss. 1990) (emphasis added). Clearly, Mississippi's law is different from the preclusionary statute at issue in *Beck*, and the Mississippi Supreme Court has so held. Therefore, there is no reason for the Mississippi Supreme Court to adopt a "*Beck*" standard (as Howell contends it has), because there is no federally unconstitutional preclusion in Mississippi law.[9]

In addition, the Mississippi Supreme Court has distinguished *Beck* claims from the longstanding (and much more liberal) state law on lesser-offense instructions. For

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[9]In fact, to the contrary (as Howell pointed out in his petition), Mississippi's statute is quite generous in allowing for instructions on lesser offenses in capital cases. *See* Miss Code Ann. § 99-17-20 ("The judge, in cases where the offense cited in the indictment is punishable by death, may grant an instruction for the state or the defendant which instructs the jury as to their discretion to convict the accused of the commission of an offense not specifically set forth in the indictment returned against the accused").

example, in the capital murder case of *Goodin v. State*, 787 So. 2d 639 (Miss. 2001), the inmate cited *Beck* and claimed that the trial court erred in the denial of a culpable-negligence manslaughter instruction. The Mississippi Supreme Court distinguished *Beck* and held that Goodin's jury was given the option of sentencing him to "the death penalty; life imprisonment without parole; or life imprisonment [and that these] options go far beyond sentencing the defendant to death or setting him free as condemned in *Beck*." *Goodin*, 787 So. 2d at 656. *See Jackson v. State*, 684 So. 2d 1213, 1228 (Miss. 1996) (separately addressing state law and *Beck* claim and distinguishing *Beck* on this same basis); *In re Jordan*, 390 So. 2d 584, 585, (Miss. 1980) (distinguishing *Beck* for same reason).

Furthermore, the Mississippi Supreme Court in *Goodin* clearly held that it considered the state and federal claims to be totally distinct and separate: "Having found no constitutional flaws in the jury instruction given, we must now determine whether **our practice** entitles Goodin to a manslaughter instruction. . . . The trial judge correctly found that Goodin presented no evidence at trial to warrant an instruction on culpable negligence manslaughter. This assignment of error is without merit." *Id.* (emphasis added).

Thus, even when an inmate squarely raises a *Beck* claim in the Mississippi Supreme Court (which Howell did not do), the Mississippi Supreme Court has never held that *Beck* is

controlling authority or adopted a "*Beck*" standard for considering the state-law question of the denial of lesser-offense instructions. To the contrary, the Mississippi Supreme Court has distinguished *Beck*, rather than embraced it.

Basically, Howell's convoluted claim on this point appears to be based on the following facts: (1) in his brief in the lower court, Howell cited a case (*Harveston v. State*, 493 So. 2d 365 (Miss. 1986)) for one proposition (*i.e.*, that a murder instruction is appropriate in Mississippi where the jury could have found that the defendant did not commit the murder in the course of a robbery) and that case cited a case (*Fairchild, supra*) that cited *Beck, supra*, in passing for another proposition (*i.e.*, that the denial of lesser-included offense instructions can have constitutional ramifications); and, (2) the State, in its brief in the lower court, cited a case (*Randall v. State*, 716 So. 2d 584 (Miss.1998)) for one proposition (*i.e.*, that this crime only occurred in the context of a robbery) and that case cited a case (*Fairchild, supra*) that cited *Beck, supra*, in passing for another proposition (*i.e.*, that the denial of lesser-included offense instructions can have constitutional ramifications). Based on these facts, Howell now contends that, "both Howell and the State of Mississippi were operating on the notion that the rule they were seeking to have applied was based on the federal constitutional due process clause as interpreted by Beck v. Alabama." Brief for Petitioner at 14. Not only is this analytically impossible, it is also completely inaccurate.

This Court has held that – even when a petitioner makes casual references in the lower court to federal authority in support of arguments on state law or in the context of an unrelated argument – the petitioner has not sufficiently preserved a federal claim for review. *Adams*, 520 U.S. at 88; *Bankers Life* at 77-78; *Board of Directors of Rotary, Int'l*, 481 U.S. at 550, n. 9; *Webb*, 451 U.S. at 493. Surely, therefore, it is completely illogical and specious for Howell to assert that he properly raised a federal claim below, based on the facts he has presented to this Court.[10] This reference to federal authority that both Howell and the State are alleged to have made is far too vague and far too removed from the actual issue in the lower court to even be considered comprehensible – much less an affirmative showing that Howell raised a federal claim in the lower court. Furthermore and most assuredly, the State was, in no manner "operating on the notion" that Howell raised a federal claim with respect to this issue in the lower court. Howell's argument to the contrary is simply incorrect.

Indeed, if the State had this "notion" (as Howell now contends), the State would have argued that such a federal claim was procedurally barred from consideration by the Mississippi

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[10]To reiterate, those facts were: (1) that Howell cited a case in the context of a state-law argument below that cited a case that cited the federal authority in passing for a different reason, and/or, (2) that the State – not Howell – cited a case, in the context of a state-law argument below, that cited a case that cited the federal authority in passing for a different reason.

Supreme Court for failure to raise in the trial court. *See Evans v. State*, 725 So. 2d 613, 632 (Miss. 1997) (reiterating that issues not presented to trial judge are "procedurally barred and error, if any is waived [and that this] rule is not diminished in a capital case"). *Williams v. State*, 684 So. 2d 1179, 1203 (Miss. 1996) (same). *See also Byrom v. State*, 863 So. 2d 836, 878 (Miss. 2003) (reiterating that "an objection on one or more specific grounds constitutes a waiver of all other grounds") (quoting *Doss v. State*, 709 So. 2d 369, 378 (Miss. 1996) and *Conner v. State* 632 So. 2d 1239, 1255 (Miss. 1993)); *Bishop v. State*, 812 So. 2d 934, 942 (Miss. 2002) (same).

Furthermore, the State would have argued that any federal claim was barred in the Mississippi Supreme Court for Howell's failure to cite authority.[11] *Byrom*, 863 So. 2d at 853 (reiterating that the failure to cite relevant authority obviates the Mississippi Supreme Court's obligation to review such issues on appeal); *Howell v. State*, 860 So. 2d 704, 760 (Miss. 2003) (same, even in the instant case); *Simmons v. State*, 805 So. 2d

[11]Howell asserts that he argued at trial that the disputed instructions would "avoid placing the jury in the untenable position of convicting him of capital murder or cutting him loose. . . this argument being this Court's primary rationale supporting Beck v. Alabama." Brief for Petitioner at 14. However, such vague phraseology clearly is not enough to properly present a *Beck* claim to the Mississippi Supreme Court under that court's rules (which require the citation of relevant authority to support any claim).

452, 487 (Miss. 2001) (same); *Mitchell v. State*, 792 So. 2d 192, 202 (Miss. 2001) (same).

Thus, "[e]ven if, as a matter of federal law, petitioner had properly raised [his] federal question, we might still confront here an independent state procedural ground barring our consideration of the federal issue." *See Webb*, 451 U.S. at 498, n. 4.

In addition, Howell's claim that he or the State somehow raised the federal claim by implication (by citing a case that cited a case that cited *Beck*) is obviously feeble and transparent. Furthermore, as noted previously, the two cases cited by the Mississippi Supreme Court were pre-*Beck* and certainly could not be construed as to have implicitly encompassed a *Beck* claim.[12] Based on the foregoing, it can only be concluded that the *Beck* claim was not implicitly pressed or passed upon in the lower court.

This conclusion brings the analysis back to the practical reasons for rejecting flimsy claims of jurisdiction such as the one Howell now brings before this Court. That is – in order to demonstrate that the federal claim was not implicitly raised or considered below – the State has now reported to the Court in summary fashion on Mississippi's law regarding certain

[12]Indeed, this fact seemed to be a considerable point of contention in Howell's petition for certiorari, but has now been dropped in favor of this new argument on the supposedly intrinsic nature of the *Beck* claim in Mississippi law.

procedural bars as well as the state law for nearly the past three decades on the propriety of murder and manslaughter instructions in capital murder cases. This fact alone demonstrates the inherent, practical difficulties in applying Howell's position regarding jurisdiction

Pragmatically speaking, it is much more appropriate to place the light burden on petitioners to this Court to interject the "federal" nature of any given claim into the proceedings below. Otherwise, in every direct appeal of a criminal conviction in the state courts, the State would be forced to brief all possible federal constitutional claims and the state courts would be forced to address such claims – regardless of whether the inmate actually raised such claims, or, in fact, intended to do so.

It would be completely unfair to place the burden on state courts to be clairvoyant by requiring them to determine whether they are inadvertently missing an opportunity to address a federal claim. This is especially true, when an unarticulated federal claim could possibly serve as the basis for reversal by this Court. Surely, if the concept of comity is to have any meaning, then a party must be required to posit a claim in the state court in such a manner as to make that court aware of the alleged federal nature of the claim.

Moreover, if Howell's position were adopted, this Court would be forced to study the law of all fifty states on every conceivable constitutional question every single time a decision is made on whether to grant a writ of certiorari under 28 U.S.C.

§ 1257. Indeed, in every case, the parties would have to litigate the issue of how closely aligned the state and federal law are[13] or should have to be – in order for this Court to decide whether to hear a federal claim that the state court did not even know it was being asked to consider. Clearly, Howell's position on jurisdiction is illogical and impractical.

The dispositive question upon which this Court must base its decision on Howell's case is not (as Howell contends) whether there is a federal basis for Mississippi's law on lesser-offense instructions. Rather, and with respect, the question is: whether this Court needs to know Mississippi's law on this or any subject – prior to deciding whether to grant a writ of certiorari. *See Webb*, 451 U.S. at 501 (noting that, "[i]n terms of our own workload, this is a very substantial matter"). *See also Michigan v. Long*, 463 U.S. 1032, 1039 (1983) (noting that the "process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar").

It would be impossible to substantively analyze the similarities between state and federal laws in every case – prior

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[13]Indeed, no State (including Mississippi) may afford less protection to its inmates than those protections which are guaranteed and made applicable to the States in the federal constitution. Therefore, every state-court decision, by implication, must give a criminal defendant the minimal federal protection, when applicable. This does not mean that the criminal defendant has raised a federal claim or that the lower court has ruled upon a federal claim.

to determining whether jurisdiction exists under 28 U.S.C. Section 1257. Rather, the more appropriate course of action is to continue to apply this Court's longstanding precedent (set forth above), which requires the petitioners in this Court to demonstrate that the questions presented in the petition for a writ of certiorari were actually raised or considered in the lower court.

C. THE APPROPRIATE CONCLUSION TO BE DRAWN IN THIS CASE IS THAT HOWELL HAS FAILED TO ESTABLISH THIS COURT'S JURISDICTION TO CONSIDER THE QUESTION PRESENTED IN HOWELL'S PETITION.

The *Beck* claim at issue in Howell's petition for certiorari was never explicitly or implicitly raised or ruled upon in the court below.

> At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law.

Webb, 451 U.S. at 501 (emphasis in original). Howell has utterly failed to affirmatively show that he meets these minimal requirements. Therefore, the State respectfully submits that this Court is without jurisdiction to hear the question Howell presents for consideration.

II. *BECK V. ALABAMA*, 447 U.S. 625, 638 (1980), IS WHOLLY INAPPLICABLE TO HOWELL'S CASE.

Howell's substantive claim is that "under the Eighth and Fourteenth Amendments to the Constitution of the United States" he was entitled to have his jury instructed on murder and manslaughter. In support of this proposition, Howell cites *Beck v. Alabama*, 447 U.S. 625, 638 (1980), in which this Court struck down an Alabama statute that precluded juries in capital cases from considering statutory lesser-included offenses that were supported by the evidence. The Alabama statute further mandated that the jury automatically impose the death penalty upon finding a defendant guilty of a capital offense. This Court held that the Alabama procedure "introduce[d] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Beck*, 447 U.S. at 643.

Howell's case is distinguishable from *Beck*, *supra*, for three reasons. First, the Mississippi statutes are completely different from the unconstitutional Alabama statutes at issue in *Beck*, *supra*. There is nothing in Mississippi's law that would have prevented Howell from receiving the requested instructions, if they had been warranted by the evidence. In addition, *Beck*, *supra*, applies only to offenses that are lesser-included under state law. Howell has utterly failed to even argue – much less demonstrate – that culpable-negligence manslaughter is a lesser-included offense of capital murder

under the Mississippi statutes. Finally, *Beck*, *supra*, applies only in cases where the proposed lesser-included offense instruction was supported by the evidence adduced at trial. As the Supreme Court of Mississippi plainly held, there was no evidence to support either the murder or the manslaughter instructions at issue in Howell's case.

Generally speaking, Howell's claim before this Court appears to mischaracterize an evidentiary question that was answered by the state court as a "due process" question. This "due process" claim is untenable, given that Mississippi's laws provide more protection than the federal authority. For all these reasons, Howell's claim is without merit.

A. MISSISSIPPI'S CAPITAL SENTENCING SCHEME IS STRIKINGLY DISSIMILAR TO THE UNCONSTITUTIONAL ALABAMA STATUTE AT ISSUE IN *BECK*.

The Alabama statute at issue in *Beck* "specifically prohibited [the trial judge] from giving the jury the option of convicting the defendant of a lesser included offense." *Beck*, 447 U.S. at 628. Mississippi's capital sentencing scheme contains no such preclusion clause. *See Jackson v. State*, 337 So. 2d 1242 (Miss. 1976) (striking down such a clause, prior to *Beck*).

To the contrary, Mississippi law very liberally allows for murder and/or manslaughter instructions in any capital murder case, when supported by the evidence. *See Mease v. State*, 539

So. 2d 1324, 1325 (Miss. 1989); *Lanier v. State*, 450 So. 2d 69, 79-80 (Miss. 1984). *See also* § 99-17-20 ("The judge, in cases where the offense cited in the indictment is punishable by death, may grant an instruction for the state or the defendant which instructs the jury as to their discretion to convict the accused of the commission of an offense not specifically set forth in the indictment returned against the accused.").

Furthermore, the Mississippi statutes do not require the jury to automatically impose the death sentence upon a finding of guilt in a capital case. *See Goodin*, 787 So. 2d at 656 (distinguishing *Beck* on this basis); *Jackson*, 684 So. 2d at 1228 (same); *Jordan*, 390 So. 2d at 585. *See also* Miss Code Ann. § 97-3-21 (setting forth sentencing options for one convicted of capital murder as life, life without parole, and death).

Thus, Howell's jury "did not have to consider the dilemma faced by Beck's jury; its alternative to death was not setting [Howell] free, but rather sentencing him to life [or life without parole]." *See Hopkins v. Reeves*, 524 U.S. 88, 98-99 (1998) (noting the importance of such a distinction, but declining to decide "whether that difference alone would render *Beck* inapplicable").

Simply put, there is nothing about Mississippi's law that would have prevented Howell from receiving the requested instructions, if the instructions were warranted by the evidence. Therefore, the due process violation at issue in *Beck* would never be at issue under Mississippi law. Howell's claim before

this Court appears to mischaracterize an evidentiary question that was answered by the state court as a due process question. However, this "due process" claim is untenable, given that the process afforded Howell under Mississippi law is completely consistent with the federal authority (and, in fact, Mississippi's law affords Howell more protection than the federal law does).

Clearly, the "'artificial barrier' that restricted [Alabama's] juries to a choice between conviction for a capital offense and acquittal" does not exist in Mississippi. *See id.* at 96 (citations omitted). Therefore, the *Beck* decision is inapplicable to Howell's case, due to the differences in the state statutes at issue.

B. HOWELL HAS FAILED TO ESTABLISH THAT THE CULPABLE-NEGLIGENCE MANSLAUGHTER INSTRUCTION AT ISSUE WAS FOR A CRIME THAT IS CONSIDERED A LESSER-INCLUDED OFFENSE OF CAPITAL MURDER UNDER MISSISSIPPI LAW.

With respect to the culpable-negligence manslaughter instruction at issue in the instant case, Howell has failed to allege – much less demonstrate – that such manslaughter is a lesser-included offense of capital murder as defined by the statute under which Howell was charged. This Court has clearly limited the holding in *Beck*, *supra*, to cases where state law recognizes the offense at issue as a lesser-included offense of the capital offense (*i.e.*, the elements of the lesser-included

offense mirror elements of the primary offense). There simply is no federal requirement that a state court give an instruction "on some *other* offense – what could be called a 'lesser related offense' – when no lesser included offense exists." *Hopkins v. Reeves*, 524 U.S. at 97 (emphasis in original).

As stated previously, Mississippi's law is far more generous to those accused of capital murder. Therefore, the issue of whether this was a lesser-included or simply a lesser-related offense was immaterial to the state court.[14] However, for purposes of this Court's analysis of the *Beck* claim, it is significant that Howell has failed to even argue that culpable-negligence manslaughter is a lesser-included offense of capital murder as defined by the applicable statutes. Even a cursory review of the pertinent statutes clearly indicates that he cannot credibly make such a claim.

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[14]This distinction between the state and federal law on this question highlights the jurisdictional problem outlined above. It cannot be determined from this record whether – on the facts in this case – culpable-negligence manslaughter (or for that matter, murder) could be considered a lesser-included offense under Mississippi law. The state court was never asked to make such a determination. In fact, that determination was irrelevant under state law, which allows for an instruction on **any** homicide in a capital murder case, when supported by the evidence. As stated previously, this fact alone eviscerates Howell's contention that the state and federal claims "are virtually identical" on this question. *See* Brief for Petitioner at 17, 18.

That is, Howell was convicted of capital murder, defined by state statute as follows: "The killing of a human being without the authority of law by any means or in any manner. . . [w]hen done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies[.]" *See* Miss. Code Ann. § 97-3-19(2)(e).

Howell simply cannot and does not demonstrate that the elements of culpable-negligence manslaughter are also elements of the primary offense of capital murder. The record reflects that proposed instructions D-13 and D-18 on culpable-negligence manslaughter were identical[15] and were based on the "catch-all" Mississippi manslaughter statute, which provides that: "Every other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law, not provided for in this title, shall be manslaughter." *See* Miss. Code Ann. § 97-3-47. As the instruction indicates, culpable negligence for this purpose is defined as negligence "so gross as to be tantamount to a wanton

[15]As noted previously, the distinction in the two instructions is in the definition of murder. The defendant at trial opted for the "better" definition of murder in proposed instruction D-18. J.A. at 17-20, 32.

disregard of, or utter indifference to the safety of human life[.]" J.A. at 18, 20.

There is no way that this definition of manslaughter could be a lesser-included offense of capital murder as defined above.[16] In fact, Howell does not even assert that it is. Therefore, *Beck*, *supra*, is wholly inapplicable to the manslaughter instruction[17] at issue in the instant case, given the

[16]Indeed, the manslaughter statute specifically differentiates itself from "[e]very other killing. . .not provided for in this title" – which would include capital murder. *See* Miss. Code Ann. § 97-3-47. Moreover, the capital murder statute under which Howell was convicted does not contain a culpable negligence aspect at all. *See* Miss. Code Ann. § 97-3-19(2)(e).

[17]As noted elsewhere, Howell abandoned the depraved-heart murder instruction in D-13. J.A. 17-20, 32, 36. Depraved-heart murder is defined as the "killing of a human being without the authority of law by any means or in any manner. . . [w]hen done in the commission of an act eminently dangerous to others and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular individual." *See* Miss. Code Ann. § 97-3-19 (1)(b). Howell has not demonstrated how this could be considered a lesser-included offense of capital murder.

With respect to the premeditated murder as defined in D-18, there could be circumstances under which this crime could be a lesser-included offense of capital murder as defined in Section 97-3-19(2)(e), which includes killings that are "with or without" deliberate design. *See* Miss. Code Ann. § 97-3-19(2)(e). *See also* Miss. Code Ann. § 97-3-19(1)(a) (defining murder as the "killing of a human being without the authority of law by any means or in any manner... [w]hen done with deliberate design to effect the death of any

instruction did not define a lesser-included offense of capital murder.

C. AS THE MISSISSIPPI SUPREME COURT HELD, THERE IS NO EVIDENCE IN THIS CASE TO SUPPORT THE MANSLAUGHTER AND MURDER INSTRUCTIONS AT ISSUE.

Finally, the State submits that Howell's claim is without merit because there was no evidence to support the murder and manslaughter instructions at issue in the instant case. As the Mississippi Supreme Court plainly held: "The facts of this case clearly do not support or warrant such instructions." *See Howell*, 860 So. 2d at 744. Therefore, Petitioner's claim to the contrary is without factual basis. *See, generally, Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (setting forth the deferential standard of review for factual issues determined by state courts).

Given this finding of fact and the due deference afforded such findings, it is obvious that Howell's claim is completely unsubstantiated. In fact, Howell makes only exceedingly vague assertions as to how the facts of this case might possibly constitute manslaughter or murder.

The definition of culpable-negligence manslaughter was set forth above. *See* Miss. Code Ann. § 97-3-47. The definition

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particular individual." However, as discussed, *infra*, the evidence in this case does not indicate that Howell premeditated the killing.

of murder that Howell preferred[18] at trial was contained in D-18, and is derived from the state statute on premeditated murder, which was also set forth above. *See* Miss. Code Ann. § 97-3-19(1)(a).

Howell basically enunciates four different scenarios under which he claims to have been entitled to an instruction on murder or manslaughter: (1) there was no evidence of robbery; (2) the victim sprayed mace on Howell; (3) Howell wanted only to sell the victim drugs; and (4) Howell wanted only to borrow money from the victim.[19] Generally speaking, Howell does not elaborate on how these "facts" might constitute murder or manslaughter.

Moreover, upon examining each of these scenarios, it is evident that Howell has taken great liberties with the record. Basically, Howell is attempting to hammer a square peg into what the Mississippi Supreme Court has declared to be a round hole. Howell would like to make the "facts" he presents fit

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[18]As noted previously, Howell abandoned his request for the depraved-heart murder instruction contained in D-13. J.A. 17-20, 32, 36. Nonetheless, Howell has failed to assert any facts or give any explanation as to how his actions in this case could possibly constitute depraved-heart murder, either.

[19]The Mississippi Supreme Court rejected the first three of these claims. The fourth is alleged for the first time in the Brief for Petitioner. *See* U.S. Sup. Ct. Rule 24 (a) (noting that a merits brief "may not change the substance of the questions already presented" in the petition).

Mississippi's statutory definitions of murder and manslaughter at issue, but he simply cannot do so.[20] So, rather than explaining how these "facts" support the legal definitions of any crime other than capital murder, Howell simply makes broad, conclusory claims that are without basis in fact or law.

Specifically, the first scenario Howell presents is that there was no evidence of robbery, and, therefore, the jury should have been instructed on murder.[21] The Mississippi Supreme Court considered the facts in this case in detail and concluded: "There is no doubt that there is **ample** evidence in the record that a reasonable person could infer Howell's intent to rob Pernell." *Howell*, 860 So. 2d at 739 (emphasis added). In fact, the State submits that the only explanation in the record as to why Howell flagged down the victim was that Howell "needed to make a sting" or he would be "locked up."

Regardless, however, Howell completely fails to inform this Court as to how he could have been guilty of premeditated

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[20]It is also noteworthy that Howell's defense at trial was alibi. It is quite incongruous for Howell to claim that he was not there and he did not do it, but when he did it, he did not intend to rob the victim; the victim sprayed him with mace; he only wanted to sell the victim drugs; and/or he only wanted to borrow money from the victim.

[21]It does not appear that Howell is claiming that he could be guilty of culpable-negligence manslaughter based on the alleged "fact" that he was not committing robbery. Certainly, he does not set forth how such "fact" would constitute culpable negligence.

murder in this case. There is no evidence that Howell went to the window of the victim's car to kill him, a fact which the District Attorney pointed out at trial.[22] In fact, even Howell repeatedly reminds this Court that he did not approach the victim's vehicle with his gun drawn. *See* Brief for Petitioner at

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[22]Specifically, the District Attorney argued that neither the premeditated murder nor the culpable negligence manslaughter instructions were warranted on the evidence, arguing, in part:

> [W]e couldn't prove simple murder if we wanted to. We don't have any. We don't have the intent. The murder to prove a simple premeditated murder. So that is why I say it's not a murder. This instruction is not supported by the facts of this case. They didn't know the victim so obviously he didn't have any other than to rob them and kill him other than the robbery motive. So therefore we are saying that there is no evidence of premeditation and simple murder. Whereas the evidence is sufficient to prove capital murder. And I believe the same thing would go for a manslaughter instruction if the instruction they have submitted is based upon a negligence, gross culpable negligence manslaughter. We disagree that they should – be entitled to that instruction because if you are committing the crime of armed robbery and regardless of whether it's negligence or whatever, whatever this case is whether it's with or with out deliberate design and you kill some one you are guilty of capital murder and not manslaughter.

J.A. at 32-33.

3, 4, 5, 7, 8. Thus, this first, unsubstantiated scenario avails Howell of nothing.

The second scenario Howell submits to this Court is that the victim sprayed mace on him. He does not specify which lesser crime this "fact"[23] supposedly would constitute. That is, Howell neglects to tell this Court how being sprayed with mace by the person he was trying to rob would make him guilty of manslaughter or murder under the instructions he proposed.

The third and fourth scenarios presented by Howell involve claims that he approached victim's car to borrow money from the victim or to sell drugs to the victim. Howell does not set forth any facts that would explain why the victim, who was minding his own business and running his paper route at 5:00 in the morning, would want to loan money to or buy drugs from Howell. Rather, the only evidence before the jury was that Howell needed money to pay his probation officer that day. He had ridden around all night looking for someone to rob. Finally, armed with the weapon in his waistband, he besieged the victim in this case. More telling, however, is the fact that Howell does

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[23]Indeed, there is evidence in the record that, when Howell got into the car with Lipsey after shooting the victim, Howell claimed to have been sprayed with mace. S.C.R. at 713. Howell fails to mention to this Court that Lipsey testified that he did not smell any mace or see any tears in Howell's eyes. In fact, Lipsey testified that there was nothing unusual about Howell's eyes or face. S.C.R. at 713-14. Furthermore, there is no evidence of any mace being found in the victim's car.

not explain how borrowing money from someone or selling drugs to someone would fit into the definition of premeditated murder[24] or culpable-negligence manslaughter under Mississippi law (even assuming, arguendo, that Howell was doing anything other than trying to rob the victim).

That is, even assuming for the purpose of argument that Howell did approach the victim to borrow money or sell drugs, these facts would not constitute premeditated murder or culpable-negligence manslaughter. Specifically, even assuming, arguendo, that Howell approached the vehicle of this paper carrier at 5:00 in the morning to borrow money from him or to sell him drugs – there is no evidence that he planned to kill the victim, which negates the need for an instruction on premeditated murder. Furthermore, there is no evidence (and Howell does not point to any) that would demonstrate any negligence whatsoever - much less negligence so gross as to be

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[24]In a footnote, Howell asserts that the selling-drugs scenario would have supported an instruction under Miss. Code Ann. §97-3-19(1)(c). Brief for Petitioner at 9, n. 1 (citing Miss. Code Ann. §97-3-19(1)(c) (defining murder as the "killing of a human being without the authority of law by any means or in any manner . . . [w]hen done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and or battery of a child in violation of subsection 2 of Section 97-5-39, or in any attempt to commit such felonies")). However, no proposed instruction on this theory of murder is raised. (J.A. at 17-20).

considered wanton disregard of, or utter indifference to the safety of human life.

Simply put, Howell has presented no evidence that would support the murder or manslaughter instructions at issue. Furthermore, he has not explained how any fact in this record would constitute the elements of premeditated murder or culpable-negligence manslaughter. Thus, it is evident that the Mississippi Supreme Court correctly concluded that the evidence did not warrant the murder and manslaughter instructions in this case.

For this reason, Howell's *Beck* claim must be rejected. It is undisputed that *Beck*, *supra*, does not apply in a case where the evidence fails to support a lesser-included offense instruction. This Court has specifically held:

> The *Beck* opinion considered the alternatives open to a jury which is constrained by a preclusion clause and therefore unable to convict a defendant of a lesser included offense when there was evidence which, if believed, could reasonably have led to a verdict of guilt of a lesser offense. In such a situation, we concluded, a jury might convict a defendant of a capital offense because it found that the defendant was guilty of a serious crime. 447 U.S., at 642, 100 S.Ct., at 2391. Or a jury might acquit because it does not think the crime warrants death, even if it concludes that the defendant is guilty of a lesser offense. *Id.*, at 642-643, 100 S.Ct., at 2391-2392. While in some cases a defendant might profit from the

> preclusion clause, we concluded that "in every case [it] introduce[s] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Id.*, at 643, 100 S.Ct., at 2392.
>
> The Court of Appeals, quoting this statement from our *Beck* opinion, repeatedly stressed the words "in every case." 639 F.2d, at 223-224; 628 F.2d, at 401. It concluded that we meant that the Alabama preclusion clause was a "brooding omnipresence" which might "infect virtually every aspect of any capital defendant's trial from beginning to end." *Ibid.* **It is important to note that our holding in *Beck* was limited to the question submitted on certiorari, and we expressly pointed out that we granted the writ in that case to decide whether a jury must be permitted to convict a defendant of a lesser included offense "when the evidence would have supported such a verdict."** 447 U.S., at 627, 100 S.Ct., at 2384. Thus, our holding was that the jury must be permitted to consider a verdict of guilt of a noncapital offense "in every case" in which "the evidence would have supported such a verdict."
>
> * * *
>
> *Beck* held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But **due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction.** The jury's discretion is thus

> channelled so that it may convict a defendant of any crime fairly supported by the evidence.

Hopper v. Evans, 456 U.S. 605, 610-11 (1982) (italics in original and other emphasis added).

"'Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process." *Hopkins v. Reeves*, 524 U.S. at 99 (quoting *Spaziano v. Florida*, 468 U.S. 447, 455 (1984)). Given that the Supreme Court of Mississippi has unequivocally held that there was no evidence in this case to warrant either a manslaughter or a murder instruction, it is evident that the denial of those instructions was proper. Howell received all the process that was due. If the trial court had granted the proposed instructions under these circumstances, it would have been a detriment to the process. Therefore, the State submits that Howell's *Beck* claim is without merit.

CONCLUSION

For the above and foregoing reasons the writ of certiorari should be dismissed in the instant case. With respect, this Court lacks jurisdiction to hear the question presented. Alternatively, the decision of the Mississippi Supreme Court to affirm Howell's conviction of capital murder and sentence of death should be affirmed.

Respectfully submitted,

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September 13, 2004

CERTIFICATE OF SERVICE

I, Judy T. Martin, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing **Brief for Respondent** to the following:

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This the 13th day of September, 2004.

Judy Thomas Martin
JUDY THOMAS MARTIN

No. 03-9560

Supreme Court, U.S.
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OCT 13 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

MARLON HOWELL,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Writ of Certiorari to the Supreme Court of Mississippi

REPLY BRIEF FOR MARLON HOWELL, PETITIONER

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PETITIONER'S REPLY MEMORANDUM

PETITIONER'S REQUESTED JURY INSTRUCTIONS, THE TRIAL COURT'S DENIAL OF THE REQUESTS, THE INSTRUCTIONS AS GIVEN, AND THE OBJECTIONS AS ASSERTED IN THE TRIAL COURT AND ON DIRECT APPEAL PROPERLY RAISED AND PRESERVED FEDERAL CONSTITUTIONAL CLAIMS BEFORE THE LOWER COURTS, PERMITTING THE EXERCISE OF THIS COURT'S JURISDICTION PURSUANT TO 28 U.S.C. § 1257.

Respondent attempts to deny Petitioner's preservation of the important constitutional issue before this Court by focusing on one aspect of the jury instructions and failing to view the instructions in context and the record in its entirety. In its brief, Respondent erroneously argues that jurisdiction does not exist in this Court and that "there is absolutely nothing in the state-court record to remotely indicate that Howell raised this claim for consideration below." (Respondent's Brief, p.17). At the trial level and in the Mississippi Supreme Court, Petitioner framed and raised the question in precisely the same manner as this Court recognized in *Beck v. Alabama*, 477 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

The Mississippi Supreme Court acknowledged:

[o]n appeal, Howell specifically argue[d] that:

> The jury could have found then returned to the lesser included offense of simple murder or manslaughter. ... the [c]ourt's failure to instruct the jury on the lesser included offense of simple murder and manslaughter was error. The jury as instructed had no choice but either to turn Howell

loose or convict him of [c]apital murder. ...

Howell v. State, 860 So.2d 704, 744 (Miss. 2003). *Compare, Beck v. Alabama*, 477 U.S. at 629, 100 S.Ct. at 2385, 65 L.Ed.2d 392 (1980) (holding unconstitutional the practice under which "the jury is given the choice of either convicting the defendant of the capital crime, in which case it is required to impose the death penalty, or acquitting him, thus allowing him to escape all penalties for his alleged participation in the crime.").

In an effort to avoid this Court's proper exercise of its jurisdiction to review this claim of "constitutional proportions," the Respondent attempts to parse, segregate and separate the jury instructions and the arguments raised with respect to those instructions. Respondent even goes so far as to assert in a footnote that there must be a citation to something, implying that the jury instructions and the arguments concerning them did not reference the Eighth and Fourteenth amendments or implicate the decisions of this Court under the Eighth and Fourteenth amendments to the United States Constitution. Such a contention is fallacious.

Petitioner recognizes, as the Mississippi Supreme Court did, that"[j]ury instructions are to be read together and taken as a whole with no one jury instruction taken out of context." *Howell v. State*, 860 So.2d at 745, quoting *Humphrey v. State,* 759 So.2d 368, 380 (Miss. 2000). Accordingly, at trial and on appeal, the arguments with respect to the jury instructions were of necessity completely interrelated. (J.A. 17-20, 33, 40; T. 975, 982-983, 989-1000).

Within that interwoven fabric, Howell contended the absence of evidence of a robbery and the lack of a

statutory enumeration of attempted robbery as an underlying offense for conviction of capital murder, entitled him to an instruction on simple murder as well as manslaughter. Thus, Howell's trial and appellate counsel argued that "to allow Howell to be convicted of [c]apital [m]urder when the underlying offense is 'attempted robbery' violates his Eight[h] and Fourteenth Amendment rights." Appellant's Brief to the Supreme Court for the State of Mississippi, No. 2001-DP-1104-SCT, 100, *citing Richmond v. Lewis,* 506 U.S. 40, 113 S.Ct. 28, 121 L.Ed.2d 411 (1992); *Godfrey v. Georgia,* 446 U.S.420, 427-28, 100 S.Ct. 1759, 1767-1772, 64 L.Ed.2d 398 (1980); *Gregg v. Georgia,* 428 U.S. 153, 187, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (1976); *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Recognizing in the fact-finding process the nexus between determining whether to convict or acquit the defendant of capital murder and whether to convict on a lesser included offense, this Court analyzed the application of the very cases which Howell cited. *See Beck v. Alabama,* 447 U. S. at 639 - 41, 100 S.Ct. at 2390-2391(pointing out that the State's argument that because a jury is led to believe that a death sentence will automatically follow a finding of guilt, the jurors would be more likely to return a verdict of not guilty rather than to convict, arises from the State's misreading of the cases striking down mandatory death penalties and analyzing those cases).

Accordingly, in *Beck,* as here, "the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. ... a risk [which] cannot be tolerated in a case in which the defendant's life is at stake." *Beck* at

637, 100 S.Ct. at 2389. This failure presents squarely the violation of this federal due process procedural safeguard, which was raised in the lower court, and which is "especially important in a case such as this." *Id.* It clearly establishes that the issue was presented below, and that this Court may exercise its jurisdiction pursuant to 28 U.S.C. § 1257.

Finally, Respondent attempts to argue, however, that because the Mississippi Supreme Court did not specifically address *Beck* itself, but cited its own decisions which referred to *Beck*, jurisdiction is somehow lacking. This argument fails to recognize that such an ambiguous basis for the state court's ruling does not establish clearly an independent and adequate state ground effectively excluding the exercise of this Court's jurisdiction.[1] *Michigan v. Long*, 463 U.S. 1032, 1040-1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). *Cf., Ake v. Oklahoma*, 470 U.S. 68, 75,105 S.Ct. 1087, 1092, 84 L.Ed.2d 53, (1985)("[W]when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded.") citing *Enterprise Irrigation*

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[1] Even in absence of citation to specific federal decisions with respect to the issue, review would be permissible, and a due process violation may still be raised in this Court. *See generally, Vachon v. New Hampshire*, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974).

There, the Court reversed a state criminal conviction on grounds, not raised in state court, of a violation of the Due Process Clause of the Fourteenth Amendment. The Court indicated in a footnote, *id.*, at 479 n.3, 94 S.Ct. at 665 n.3, that it possessed discretion to ignore the failure to raise the question in state court. *See also, Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) (reversal of a state criminal conviction on a ground not urged in state court).

District v. Farmers Mutual Canal Co., 243 U.S. 157, 164, 37 S.Ct. 318, 320, 61 L.Ed. 644 (1917) ("But where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain").

CONCLUSION

Based on the above reasons as well as those set forth in Petitioner's Brief previously submitted to this Court, Petitioner respectfully requests this Court to consider these issues as to the Eighth and Fourteenth Amendment claims raised before the Mississippi Supreme Court for purposes of 28 U.S.C. §1257. For the foregoing reasons, the judgment of the Mississippi Supreme Court must be reversed.

Dated: October 13, 2004

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SEP 17 2004

No. 03-9560

IN THE

Supreme Court of the United States

MARLON HOWELL,

Petitioner,

vs.

STATE OF MISSISSIPPI,

Respondent.

On Writ of Certiorari to the Supreme Court of Mississippi

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Did the state trial judge's refusal of lesser included offense instructions in a capital murder case on the ground they were unsupported by the evidence violate the United States Constitution under the rule of *Beck* v. *Alabama*?

2. Did petitioner properly raise Question 1 before the Mississippi Supreme Court, for the purposes of 28 U. S. C. § 1257, so as to give this Court jurisdiction to review it?

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IN THE

Supreme Court of the United States

MARLON HOWELL,

Petitioner,

vs.

STATE OF MISSISSIPPI,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Petitioner in this case asks this Court to decide a federal question which he did not raise in the state court, based on his claim that the state-law issue he did raise there is "virtually identical." Not only would this expand this Court's jurisdiction

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

beyond the limit in place since 1789, but the same rule would probably be applied in habeas corpus, where it would undercut both the exhaustion rule and the deference standard. It would create an incentive to "sand bag" the state court, allowing prisoners to claim the state court "unreasonably applied" a precedent of this Court, even though that precedent was never cited to the state court. This evasion of AEDPA would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On May 15, 2000, Hugh Pernell was shot and killed in his car in New Albany, Mississippi. The crime occurred in front of the home of Charles Rice, who witnessed it from inside. See *Howell* v. *State*, 860 So. 2d 704, 712, 713 (Miss. 2003). Howell was identified as the shooter by Mr. Rice as well as by co-defendant Curtis Lipsey. *Id.*, at 736. Mr. Rice saw Howell get out of another car, walk up to Mr. Pernell's car, have a conversation, and then pull out a gun and shoot Mr. Pernell. Testimony by Lipsey and other associates of Howell's indicated that he planned a robbery for the purpose of getting money to pay his probation officer, to avoid being incarcerated. *Id.*, at 713-714. Lipsey further testified that when Howell returned from Mr. Pernell's car, he said Mr. Pernell had sprayed him with mace, so he shot him. *Id.*, at 714.

Howell was charged with capital murder based on killing in the course of a robbery. He requested instructions on simple murder and manslaughter. *Id.*, at 741. The prosecutor objected on the ground that there was no evidence to support the mental element of simple murder. "[T]here is no evidence of premeditation and deliberate design which is a necessary element of simple murder." J. A. 33. The trial judge denied the instruction. 860 So. 2d, at 743. Howell was convicted of capital murder and sentenced to death. *Id.*, at 712.

SUMMARY OF ARGUMENT

From the very beginning of the federal judiciary, this Court's appellate jurisdiction over state court judgments has been limited to cases where the federal question was presented to the state court. Although the Court's cases on the required specificity of the claim have varied, the time has come to require that a federal claim be expressly identified as federal. This requirement imposes no significant burden on competent lawyers, and remedies exist for litigants with incompetent lawyers.

The claim that state courts have addressed the federal question when state and federal rules are "virtually identical" is a mirage. Rules of constitutional law are not simply abstract statements of rules, but rather are made up of bodies of case law interpreting and applying those rules. For a court to decide a claim properly, it must be directed to the correct body of case law. Different bodies of precedent may yield different results, even when the abstract statements of "the rule" are the same.

The defendant did not make a federal claim to the Mississippi Supreme Court. Neither the cases he cited directly nor the authorities relied on by those cases refer to the Fourteenth Amendment or to the *Beck* v. *Alabama* line of cases. They were decided on the basis of state law, which is more generous to defendant than *Beck* and *Hopkins* v. *Reeves* require.

ARGUMENT

I. A litigant must unambiguously apprise the state court of the federal nature of the claim to preserve the issue for this Court's review.

"In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and *error is not to be predicated upon their failure to decide questions not presented.*" *McGoldrick* v. *Compagnie Generale*

Transatlantique, 309 U. S. 430, 435 (1940) (emphasis added). Petitioner asks this Court to reverse the judgment of the Mississippi Supreme Court on the ground that the trial judge's refusal to instruct on lesser degrees of homicide violates the Eighth and Fourteenth Amendments to the United States Constitution. Brief for Petitioner 9-10. The Mississippi Supreme Court did not decide that question erroneously. It did not decide that question at all. The question was never presented to it.

In cases where the validity of statutes are not questioned, Congress has limited this Court's jurisdiction to review state judgments to cases where a federal right "is specially set up or claimed." 28 U. S. C. § 1257(a). This language has been in the jurisdictional statute from the beginning. See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85-86. To hold that a federal question is preserved simply by claiming a congruent state-law right would, in effect, strike the word "specially" from the statute. Such an action would be as unwise as it would be illegitimate. "[T]here are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts." *Webb* v. *Webb*, 451 U. S. 493, 499 (1981).

This rule is very similar to the fair presentation requirement under the habeas exhaustion rule of 28 U. S. C. § 2254(b), and it is based on similar policy considerations. See *Webb*, 451 U. S., at 500. Twice in recent habeas cases, this Court has been presented with arguments that the petitioner need not expressly identify the claim as federal, because the state and federal rules were "virtually identical." However, neither case resolved the question. In *Duncan* v. *Henry*, 513 U. S. 364, 366 (1995), the Court found that the rules were not "virtually identical," and in *Baldwin* v. *Reese*, 541 U. S. __, 124 S. Ct. 1347, 1352, 158 L. Ed. 2d 64, 72 (2004), the Court found that the argument had been waived.

Illinois v. *Gates*, 462 U. S. 213, 219 (1983) acknowledged that the Court's cases in this area have not been entirely consistent. The time has come, *amicus* submits, to lay down a clear,

simple, and easily complied-with rule: to preserve a federal claim for review in federal court, whether on certiorari or habeas, a party must unambiguously identify the claim as federal. "At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts . . . ." *Webb*, 451 U. S., at 501 (emphasis in original). For example, applying this standard, a claim that a judgment "constitutes an excessive fine, and violates constitutional principles" does not state a federal claim under the Excessive Fines Clause of the Eighth Amendment when the state constitution has its own excessive fines clause. See *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U. S. 71, 77-78 (1988). There is no need to ask if the two clauses are the same, and the *Bankers Life* Court did not.

A requirement to expressly state the federal basis of a claim presents no great burden to even a marginally competent lawyer. "A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.' " *Reese*, 124 S. Ct., at 1351, 158 L. Ed. 2d, at 71.[2] In cases of grossly incompetent lawyers for criminal defendants, ineffective assistance claims provide relief from the rigors of procedural default rules. See *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986).[3] Civil litigants have malpractice remedies.

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2. Although this is sufficient to put the state court on notice of the federal nature of the claim, a bare assertion without supporting argument and authorities would constitute a waiver of the claim in most jurisdictions. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Baldwin* v. *Reese*, No. 02-946, pp. 11-12 (available at http://www.cjlf.org/briefs/Reese.pdf).

3. Such claims are best addressed on collateral review, see *Massaro* v. *United States*, 538 U. S. 500, 504 (2003), and *amicus* CJLF takes no position on whether defendant has such a claim in the present case.

Various reasons have been advanced for requiring a federal claim to be presented to the state court first, some of which apply when the state-law claim is "virtually identical" and some of which do not. Ensuring an adequate record is one reason, see *Gates*, 462 U. S., at 221, but the record will typically not be impaired if an identical state-law claim has been fully litigated. On the other hand, the policy of enabling the state court to identify and act upon possible independent state grounds, see *id.*, at 222; *Webb*, 451 U. S., at 500-501, applies fully here. For example, if the state court has a rule that a federal claim must be made at trial to be considered on appeal, the federal claim must be expressly made on appeal to get a state-court ruling on the default question.

The primary reason for the rule, however, is that "[p]rinciples of comity in our federal system require that the state courts be afforded the opportunity to perform their duty . . . ." *Webb*, *supra*, at 499. The argument is made that when "there is no significant difference" between the state and federal rules, then "the state courts did have a fair opportunity to assess [the] federal claim." *Reese*, 124 S. Ct., at 1352, 158 L. Ed. 2d, at 73 (Stevens, J., dissenting). This argument reflects a simplistic view of the process of deciding cases. Rules of law created by judicial precedents are not simply the abstract standards stated in the opinions. Each generation of law students must be taught to carefully read the *facts* of the cases they study, not just skip ahead to "the rule." So, too, courts deciding constitutional questions must consider bodies of case law as precedents, not just apply disembodied abstract standards.

The "grossly disproportionate" punishment cases illustrate why a state court must be clearly informed whether it is being presented with a federal claim, a state claim, or both. Under this Court's precedents, a grossly disproportionate prison sentence violates the Cruel and Unusual Punishments Clause of the Eighth Amendment. See *Lockyer* v. *Andrade*, 538 U. S. 63, 72 (2003). Under the precedents of the California Supreme Court, the same rule is included in the corresponding provision

of the California Constitution. See *People* v. *Dillon*, 34 Cal. 3d 441, 478, 668 P. 2d 697, 719 (1983). However, the task of a California Court of Appeal in deciding whether a given sentence for a given crime violates one provision is not the same as deciding whether the same sentence violates the other. Deciding the federal question requires a fact-intense comparison to other Eighth Amendment proportionality cases, particularly this Court's cases. See *Andrade*, *supra*, at 73-74. The state question, on the other hand, requires particular attention to California Supreme Court precedents, and if the defendant makes both arguments, the reviewing court must undertake both analyses. See, *e.g.*, *People* v. *Weddle*, 1 Cal. App. 4th 1190, 1193-1200, 2 Cal. Rptr. 2d 714, 715-720 (1991). The results are not necessarily the same. Compare *Harmelin* v. *Michigan*, 501 U. S. 957, 961, 994, 996 (1991) (life without parole for 672 grams of cocaine, first offense, affirmed), with *In re Foss*, 10 Cal. 3d 910, 915-917, 519 P. 2d 1073, 1075-1076 (1974) (10-year minimum for five counts of furnishing heroin with one prior, reversed).

The differences in the tasks presented become even greater in the state court of last resort. If the court of last resort of a jurisdiction finds the precedents of that jurisdiction unclear or conflicting, it can overrule them to the extent necessary to establish consistency. See, *e.g.*, *Nichols* v. *United States*, 511 U. S. 738, 745-746 (1994). Lower courts do not have that option. They must instead follow higher courts' precedents, to the extent their rules can be discerned. See *Agostini* v. *Felton*, 521 U. S. 203, 237 (1997). Unless a claim is identified as state or federal, a state high court does not know whether it is acting as a court of last resort with authority to overrule or modify conflicting or unwise precedents or whether it is acting as a court of subordinate jurisdiction, duty-bound to follow this Court's precedents whatever it may think of them.

The claim of "virtually identical" state and federal rules is a mirage. For many rules, the general standard is a skeleton, and the case-by-case application of the standard to real facts

puts the flesh on the bones. See, *e.g.*, *Strickland* v. *Washington*, 466 U. S. 668, 698 (1984); *United States* v. *Banks*, 540 U. S. 31, 124 S. Ct. 521, 524-525, 157 L. Ed. 2d 343, 352 (2003); *Yarborough* v. *Alvarado*, 541 U. S. __, 124 S. Ct. 2140, 2149, 158 L. Ed. 2d 938, 951 (2004). Even if the respective statements of "the rule" are truly identical, each abstract statement of the rule refers to a different body of precedent under the ultimate control of a different court.

As important as the requirement of fair presentation is on direct review, it is even more important on habeas corpus after the Antiterrorism and Effective Death Penalty Act of 1996. The federal habeas court must examine whether the state court identified the pertinent Supreme Court precedents and applied them reasonably to the facts of the case. See *Lockyer* v. *Andrade*, 538 U. S., at 73-76. How can a federal court decide whether a state court unreasonably applied clearly established federal law, see 28 U. S. C. § 2254(d), when the state court was never told that a federal claim was being made?

Simple rules produce efficient litigation and clear results. Complex rules, riddled with exceptions, produce expense, delay, and doubt. When exceptions are necessary to prevent injustice, the price of litigating the exceptions must be paid. See, *e.g.*, *Carrier*, 477 U. S., at 496 (actual innocence exception to procedural default rule). No such necessity is presented here, and the price is high.

If a "virtually identical rule" exception is created, then this Court must determine whether the state and federal rules are actually close enough to qualify before the Court can be sure of its jurisdiction. See *Henry*, 513 U. S., at 366. This determination will require examination of two bodies of case law, not just comparison of abstract rules. The determination will have to be made each time, because bodies of case law that were once consistent may diverge in time.

On the other hand, the net yield from this exercise, in terms of preventing injustices that would otherwise go uncorrected,

is low. Federal habeas remains available despite default in cases of cause and prejudice, ineffective assistance, or actual innocence. See *Carrier*, 477 U. S., at 485, 488, 496. Further, by definition, the defendant has already received a hearing and decision on a "virtually identical" state rule. The only cases where the proposed exception would produce a better result are those where the state court decides the issue incorrectly to produce an unjust result, yet the defendant does not qualify for any of the gateways to habeas relief. The number of such cases is vanishingly small. If the federal violation is glaring and the state decision clearly wrong and unjust, then failure to raise the federal claim is ineffective assistance and prejudicial. If the federal question is close, then reversal of the judgment on certiorari or relief from it on habeas "is not proof that justice is thereby better done." *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in the result).

In this instance, the simple rule is the just rule. A party who wishes to preserve a federal claim in state court must identify it as such, either by citing the federal laws or Constitution or by citing a case (or point in a case) decided *solely* on federal grounds.

II. Defendant did not make a federal *Beck* claim in the Mississippi Supreme Court.

A. Due Process and State Law.

Beck v. *Alabama*, 447 U. S. 625 (1980) requires a lesser included offense instruction when the lesser offense is recognized as included under state law and when evidence supports such a verdict. See *Hopper* v. *Evans*, 456 U. S. 605, 609 (1982); *Hopkins* v. *Reeves*, 524 U. S. 88, 94-96 (1998). *Beck*

is essentially a due process case, see *Hopper*, *supra*, at 609, although it has Eighth Amendment overtones. See *id.*, at 611.[4]

Like most due process rules, the constitutional rule announced in *Beck* was already nonconstitutional law in most states in its general outline. See *Beck*, 447 U. S., at 635-637, and n. 12. This is not surprising, because the universality of a rule throughout the United States is a principal consideration in determining that the rule is an essential component of the process that is due. See *id.*, at 637; *In re Winship*, 397 U. S. 358, 361-362 (1970). Conversely, however desirable this Court may consider a rule to be, "long-standing and widespread use" of a contrary procedure is powerful evidence that the rule is not mandated by the Due Process Clause. See *Spencer* v. *Texas*, 385 U. S. 554, 564 (1967); *Schad* v. *Arizona*, 501 U. S. 624, 640 (1991) (plurality opinion).

However, raising even a universally acknowledged rule to a federal constitutional mandate has an adverse side effect. It involves the federal courts in policing the details of rules that had previously been matters of state law. For example, although proof beyond a reasonable doubt in adult criminal trials was the universal rule long before *Winship*, 397 U. S., at 361-362, the constitutionalization of that rule required this Court to engage in detailed parsing of state jury instructions. See *Cage* v. *Louisiana*, 498 U. S. 39, 41 (1990) (*per curiam*); *Victor* v. *Nebraska*, 511 U. S. 1 (1994). The results have been dubious. See *Estelle* v. *McGuire*, 502 U. S. 62, 72-73, n. 4 (1991) (disapproving *Cage* in part); *Sullivan* v. *Louisiana*, 508 U. S. 275, 278, n.* (1993) (reserving question of whether identical instruction would now survive review under the revised standard).

A similar result follows from *Beck*. Although the broad outline of the rule was almost universal before *Beck*, the details

4. In *Beck* itself, the defendant argued both provisions, see 447 U. S., at 632, and the opinion does not say expressly which provision it is based on.

of its implementation were not. "[S]tates vary in their descriptions of the quantum of proof necessary to give rise to a right to a lesser included offense instruction . . . ." 447 U. S., at 636, n. 12. Petitioner now asks this Court to supervise the Mississippi courts on the very point that was not universal at the time of the *Beck* decision.

A strong argument can be made that the constitutional mandate found by *Beck* is limited to cases where the "quantum of proof" meets the most demanding standard from among those cited for the national consensus, see *ibid.*, and that anything more generous to the defendant is a matter of state law. For the present case, though, it is not necessary to decide that question. Indeed, if the Court has no jurisdiction, it is not proper to decide that question. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 94 (1998). For the present case, it is only necessary to hold that before the Mississippi Supreme Court can be second-guessed on whether the defendant met the "quantum of proof" requirement of *Beck* and *Hopper*, it must be apprised that a federal question is at issue.

B. Beck and Felony Murder.

Beck v. *Alabama*, *Hopper* v. *Evans*, and *Hopkins* v. *Reeves* were all felony murder cases, as is the present case. The long-standing and widespread rule throughout most American jurisdictions is that the mental state for first-degree murder may be either premeditation *or* intent to commit certain felonies, including robbery. See *Schad*, 501 U. S., at 640-641. Second-degree murder typically requires intent to kill but not premeditation. It may also include killings in the course of felonies other than those listed for first-degree and so-called "depraved heart" murder. See 2 W. LaFave, Substantive Criminal Law § 14.7(e), p. 487 (2d ed. 2003); see also *id.*, § 14.4, at 436-444 (describing "depraved heart" murder).

Since one cannot premeditate without intending, intent-to-kill second-degree murder is necessarily included in premeditated first-degree murder. However, since it is quite possible to

commit first-degree felony murder without intending to kill, intent-to-kill second-degree murder is "included" only if the state chooses to define included offenses more broadly than strict logic demands. If the state chooses the strict route, so that instruction on intent-to-kill murder is improper as a matter of law when felony murder is charged, *Beck* does not stand in the way. *Hopkins*, 524 U. S., at 90-92; see also *Schmuck* v. *United States*, 489 U. S. 705, 715-716 (1989) (adopting strict "elements" test and rejecting "inherent relationship" test for federal criminal cases). On the other hand, a state may, if it wishes, provide instructions on a "lesser related offense," *i.e.*, an offense that has an element not included in the elements of the greater offense. See, *e.g.*, *People* v. *Geiger*, 35 Cal. 3d 510, 514, 674 P. 2d 1303, 1303 (1984) (adopting lesser related offense rule), overruled in *People* v. *Birks*, 19 Cal. 4th 108, 112-113, 960 P. 2d 1073, 1074-1075 (1998) (returning to elements test); see also *Hopkins*, *supra*, at 97.

In *Beck*, the defendant was tried for an offense that required proof of both intent to kill *and* killing in the course of a robbery. See 447 U. S., at 627-628. Felony murder was a lesser included offense under the strict elements test, see *id.*, at 628, and it was undisputed that the evidence was sufficient to warrant a lesser included offense instruction, *i.e.*, there was a basis for doubt on intent. See *id.*, at 630. *Hopper*, 456 U. S., at 607, was another Alabama case involving the same law, but no doubt whatever of intent, and therefore no basis for a lesser included offense instruction. See *id.*, at 613.

The present case differs from *Beck* and *Hopper* in that Mississippi capital murder includes felony murder as traditionally defined, with no *mens rea* beyond intent to commit the felony. See *Howell* v. *State*, 860 So. 2d 704, 738 (Miss. 2003); Miss. Code Ann. §97-3-19(2)(e). A completed felony is not required; attempt is sufficient. § 97-3-19(2)(e). Simple murder is defined with three alternative mental states: deliberate design, depraved heart, or felonies other than the capital felony murder felonies. § 97-3-19(1).

In the present case, Instruction S-1[5] gave the elements of capital murder as the killing of a human being, "unlawfully, illegally, and feloniously . . . with *or without* the deliberate design" to kill, during a robbery. See Appendix A (emphasis added). Instruction S-2 defined robbery in a way that includes attempted robbery. See *ibid.* Defendant's proposed instruction D-13 defined simple murder with the added element "in the commission of an act inherently dangerous to others and evidencing a depraved heart, regardless of human life . . . ." J. A. 17. It also proposed a negligent manslaughter instruction. See *ibid.* Defendant's proposed instruction D-18 requested a simple murder instruction with the added element "*with* the deliberate design" to kill, plus the negligent homicide instruction. J. A. 20 (emphasis added). Thus, each variant of homicide for which defendant requested an instruction had an element *not* included in the elements of capital murder.

In this Court, defendant claims the evidence supported the third variant of simple murder: commission of a felony not among those listed for capital murder, specifically selling drugs. Brief for Petitioner 9, n. 1. His Statement of the Case, *id.*, at 2-5, does not cite any evidence whatever that would have supported a conviction for that offense.

Simple murder in Mississippi is therefore what *Hopkins* and *Geiger* called a "lesser related offense" of capital murder when the capital murder charge rests on a felony murder theory, as in this case. This case differs from *Hopkins*, however, in that state law does permit instruction on this lesser related offense if supported by the evidence. *Howell*, 860 So. 2d, at 744.

As a general rule, Mississippi follows the same elements test as *Schmuck*. A lesser included offense is one whose elements are all included in the elements of the greater offense. See *State* v. *Shaw*, No. 2001-KA-01854-SCT ¶ 18 (Miss., Aug.

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5. Instructions S-1 and S-2 are reproduced in Appendix A to this brief. S-3 and S-6 are quoted in the state court opinion. 860 So. 2d, at 741. D-13 and D-19 are in the Joint Appendix.

12, 2004). A lesser offense with a different element, what *Hopkins* and *Geiger* called a "lesser related offense" is simply called a "lesser offense" in Mississippi. See *ibid.*

Homicide, however, is special. The degrees of homicide have never fit neatly into the elements model. "Malice aforethought" is supposedly the element that intent-to-kill murder has and voluntary manslaughter lacks, but the reality is that manslaughter is murder plus the mitigating anti-element of "heat of passion on sudden provocation." See *Mullaney* v. *Wilbur*, 421 U. S. 684, 693-694 (1975).

Mississippi treats manslaughter as a lesser included offense of murder notwithstanding the fact that it does not meet the strict elements test. See *Shaw*, *supra*, ¶¶26-27; *id.*, at ¶35 (Carlson, J., dissenting). In the typical case, this laxity in definition benefits the defendant, for the reasons stated in *Beck*, although there are some cases, such as *Shaw*, where the defendant *wants* the "all or nothing" instruction. See *id.*, at ¶38 (Carlson, J., dissenting). However, Mississippi law is symmetrical. Either party gets the instruction on request, if supported by the evidence, and the same is true for "simple" murder as a lesser included offense of capital murder. See *Harveston* v. *State*, 493 So. 2d 365, 374-375 (Miss. 1986). The special status of degrees of homicide as lesser included offenses was codified after the decision in the present case. See Miss. Code Ann. § 97-3-19(3); see also *Shaw*, *supra*, at ¶43 (Carlson, J., dissenting).

Under *Hopkins*, Mississippi is not required by federal law to instruct on simple murder as a lesser included offense of felony capital murder, but it chooses to do so when the instruction is supported by the evidence. Defendant, in essence, argues for a "no generous act goes unpunished" rule, cf. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U. S. 471, 484 (1999), extending federal scrutiny to Mississippi in the same situation where Nebraska's strict rule precluded it in *Hopkins*. Whether *Beck* should be so extended is an important

question that has not yet been resolved and that was not presented to the Mississippi Supreme Court.

C. Defendant's State Brief.

With this background, we come to defendant's brief in the Mississippi Supreme Court. Issue XIV is the lesser included offense claim, argued on pages 101-102 of the brief, reprinted at J. A. 39-40.

Defendant's state brief cited and misquoted *Conner* v. *State*, 632 So. 2d 1239 (Miss. 1993), overruled on other grounds, *Weatherspoon* v. *State*, 732 So. 2d 158, 161 (Miss. 1999). Although no point page is given, the reference is clearly to part IV of *Conner*, on pages 1253-1255. No case outside Mississippi is cited in this part of *Conner*, and no federal law is mentioned. For its substantive holding, *Conner* relies primarily on *McGowan* v. *State*, 541 So. 2d 1027, 1028 (Miss. 1989), a noncapital case decided entirely on state law.

Defendant's brief also cited *Harveston* v. *State*, 493 So. 2d 365, 373 (Miss. 1986). *Harveston* was the reverse of the present situation, where the simple murder instructions were given over the defendant's objection, and he was convicted of the lesser offense. *Id.*, at 374. No federal claim was made or addressed. The case merely stands for the proposition that the instruction is proper under state law when supported by the evidence, unlike the Nebraska rule in *Hopkins*.

Finally, defendant distinguished *Edwards* v. *State*, 737 So. 2d 275, 311 (Miss. 1999). That case simply stated the rule of *Conner* and *McGowan* and found the instruction not warranted by the evidence. None of the three authorities cited directly by defendant discusses a federal question or a federal precedent on the pertinent point, nor does the *McGowan* case, which those cases rely on. Nothing in defendant's brief apprised the state court that a federal question was at issue.

When the elements of the charged offense are A, B, and C, and the elements of a lesser, uncharged offense are A, B, and D,

is the defendant entitled to an instruction on the lesser offense when the evidence of C is debatable but neither the prosecution nor the defense has introduced evidence of D? The Mississippi Supreme Court said no as a matter of state law, with no claim having been made under federal law. This Court has no jurisdiction to review that holding.

CONCLUSION

The writ of certiorari should be dismissed for lack of jurisdiction.

September, 2004

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

APPENDIX A

IN THE CIRCUIT COURT
OF UNION COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

vs. **Criminal Case No. UK2000-82**

MARLON LATODD HOWELL

JURY INSTRUCTION NUMBER S-1

The Court instructs the jury that the defendant, Marlon Latodd Howell, has been charged under the indictment with the crime of capital murder in the death of Hugh David Pernell.

If you find from the evidence in this case beyond a reasonable doubt that:

1) Hugh David Pernell was a living human being; and,

2) the defendant, Marlon Latodd Howell, did kill the said Hugh David Pernell in Union County, Mississippi, on or about the 15th day of May, 2000; and

3) the defendant, Marlon Latodd Howell, acted unlawfully, willfully, and feloniously, without authority of law and with or without the deliberate design to effect the death of Hugh David Pernell; and,

4) the defendant, Marlon Latodd Howell, did kill the said Hugh David Pernell at a time when the said Marlon Latodd Howell was engaged in the commission of the crime of robbery of the said Hugh David Pernell;

then you shall find the defendant, Marlon Latodd Howell, guilty of capital murder in the death of Hugh David Pernell as charged under the indictment.

If the State of Mississippi has failed to prove any one or more of these elements beyond a reasonable doubt, then you shall find the defendant, Marlon Latodd Howell, not guilty of capital murder in the death of Hugh David Pernell as charged under the indictment.

FILED THIS THE 23rd DAY
OF March 2001
BILLY STANFORD
CIRCUIT CLERK
Helen Randle D.C.

Given

IN THE CIRCUIT COURT
OF UNION COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

vs. **Criminal Case No. UK2000-82**

MARLON LATODD HOWELL

JURY INSTRUCTION NUMBER S-2

(Definition and Elements of Robbery)

THE COURT instructs the jury that if you find from the evidence in this case beyond a reasonable doubt that:

(1) The defendant, Marlon Latodd Howell, did, on or about the 15th day of May, 2000, unlawfully, willfully and feloniously, attempt to take the personal property of Hugh David Pernell; and,

(2) The defendant, Marlon Latodd Howell, attempted to take the personal property from the person of Hugh David Pernell and against the will of the said Hugh David Pernell; and,

(3) The defendant, Marlin [sic] Latodd Howell, attempted to take the property by violence toward Hugh David Pernell by shooting the said Hugh David Pernell with a pistol; and,

(4) at the time, Marlon Latodd Howell had the intent to permanently deprive Hugh David Pernell of the property,

then you shall find that the defendant, Marlon Latodd Howell, was engaged in the commission of the crime of robbery as contemplated by Jury Instruction Number S-1.

If the State of Mississippi has failed to prove any one or more of these elements beyond a reasonable doubt, then you shall find that the defendant, Marlon Latodd Howell, was not engaged in the commission of the crime of robbery as contemplated by Jury Instruction Number S-1.

FILED THIS THE 23rd DAY
OF March 2001
BILLY STANFORD
CIRCUIT CLERK

Given

Helen Randle D.C.